5-710

Dec 12,

Feb 1?

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 1012

Martin Kelly et al Intervenors

~~MILTON S. CALHOUN and LOUISA MEYER~~

Appellants

vs.

~~PADUCAH & MEMPHIS RAILROAD COMPANY~~

Milton S. Calhoun & L. H. Meyer Trustees

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TENNESSEE.

Filed 13 December 1877

Dec 13

Dec's Brief

SUPREME COURT OF THE UNITED STATES.

No._____

PHILO C. CALHOUN AND LOUIS H. MEYER,

VS.

THE PADUCAH & MEMPHIS RAILROAD COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TENNESSEE.

INDEX.

	ORIGINAL.	PRINT.
Style of Court and cause	1	3
Order of Court as to original petition	2	3
Order of Court as to substituted petition	4	4
Substituted petition	6	5
Supplemental petition	46	24
Railroad Mortgage	23	10
Demurrer of Complainants	54	26
Final decree	57	27
Appeal bond	60	28
Agreement of counsel	64	29
Certificate of clerk	71	31

1 United States of America—Western District of Tennessee.

In the Circuit Court of the United States, within and for the Western District of Tennessee, in the Sixth Judicial Circuit thereof.

Proceedings had in said Court, at a Regular Term thereof, begun and held for its November Term, A. D. 1874, at the United States Courthouse, in the City of Memphis, in said District, on to-wit: the 6th day of June, A. D. 1876, in the following cause, to-wit:

P. C. Calhoun and L. H. Meyer, (Petition of Martin Kelly, et al.,) } Plaintiffs,

[No. 229.] vs. [Equity.]

Memphis & Paducah R. R. Co., et al., } Defendants.

METCALF & WALKER,
Atty's for Petitioners.
PATTERSON & LOWE,
Atty's for Defendants.

2 United States of America—Western District of Tennessee.

In the Circuit Court of the United States, within and for the Western District of Tennessee, in the Sixth Judicial Circuit thereof.

Proceedings had in said Court, at a Regular Term thereof, begun and held for its May Term, A. D. 1876, at the United States Courthouse, in the City of Memphis, in said District, on to-wit: the 6th day of June, A. D. 1876, in the following cause, to-wit:

Philo C. Calhoun and Louis H. Meyer, } Plaintiffs,

[No. 229.] vs. [Equity Docket.]

The Paducah & Memphis R. R. Co., et al., } Defendants.

This day appear by counsel, in open Court, Martin Kelly and Thomas Coyne, (firm of Martin Kelly & Co.,) Donald McDonald, H. T. Ellett, C. G. Fisher, and E. G. and A. J. Robinson, and presented to the Court a petition, averring that they are judgment creditors of the Paducah and Memphis Railroad Company, and claiming that the lien of their judgment is prior and superior
3 to the alleged mortgage, for the foreclosure of which this Bill is filed. The said petition having been inspected by the Court, the Court is of opinion that it is proper to file the same in this cause, and leave is granted to do so; and in accordance with the prayer of said petition, leave is hereby granted to the said petitioners to levy the executions on the several judgments upon any and all of the lands and real estate of the said Paducah and Memphis Railroad Company, including its roadbed and iron and cross-ties laid upon the

same, tracks, sidetracks, switches, bridges, depots, stationhouses, water tanks, machine shops, warehouses, and the lands upon which the same are built, which said property has been heretofore impounded and sequestered by the appointment of a Receiver thereof. After the said executions have been levied as aforesaid, the said petitioners must desist from further proceedings under the same, except by permission of, and under the order and direction of this Court. It is further ordered that the Clerk of this Court issue a notice, to be served by the Marshal of this Court on complainants, Calhoun and Meyer, or their solicitors, notifying complainants, Calhoun & Meyer, of the filing of this petition, and directing them to plead, answer, demur, or take such other action in reference to said petition as they may deem proper, within ten days from this date.

4 United States of America—Western District of Tennessee.

In the Circuit Court of the United States, within and for the Western District of Tennessee, in the Sixth Judicial Circuit thereof.

Proceedings had in said Court, at a Regular Term thereof, begun and held for its November Term, A. D., 1876, at the United States Courthouse, in the City of Memphis, in said District, on to-wit: the 2d day of March, A. D. 1877, in the following cause, to-wit:

Philo C. Calhoun and Louis H. Meyer, } Plaintiffs,

[No. 229.] vs. [Equity Docket.]

The Paducah and Memphis Railroad Company, } Defendant.

In this case it appears to the Court, by admission of the parties in open Court, that the petition heretofore filed in the cause by Martin Kelly and Thomas Coyne, firm of Kelly & Coyne, Donald McDonald, H. T. Ellett, Charles G. Fisher and E. G. and J. C. Robinson, has been lost from the files, and the counsel of said petitioners presenting to the Court an admittedly substantial copy of said
5 petition, the same by consent is ordered to be filed as a substitute for said original; and thereupon said petitioners presented to the Court a further and supplemental petition, setting forth that, by leave of the Court, had at the time of filing their original petition herein, they had caused execution to be issued on their several judgments set forth in the petition, and had caused the same to be levied on the railroad, road-bed, iron, cross-ties and other property specifically described in said levies, copies of said executions and levies being attached to and made part of said petition, and prayed for leave to file said supplemental petition, which was granted, and the supplemental petition permitted to be filed.

And thereupon said Calhoun and Meyer file their demurrer to said original and supplemental petitions.

6 To the Honorable the Circuit Court of the United States, for the District of West Tennessee.

Philo C. Calhoun and L. H. Meyer

vs.

The Paducah and Memphis Railroad Company.

[No. 229 Equity Docket.]

The petition of Martin Kelly and Thomas Coyne, partners under the name of Kelly & Coyne, Donald McDonald, H. T. Ellett, Charles G. Fisher and E. G. and J. C. Robinson, filed by leave of the Court in the above cause.

Petitioners respectfully show to the Court that said Paducah and Memphis Railroad Company is a body politic and corporate, chartered by the States of Tennessee and Kentucky, with power to construct, maintain and operate a railroad having its northern terminus at Paducah, in the State of Kentucky, and its southern ter-

7 minus at Memphis, in the State of Tennessee.

On the 19th day of July, 1875, said Calhoun and Meyer filed their original bill in this Honorable Court, alleging that on the 1st day of February, 1872, said railroad company had executed to them a trust deed, whereby it conveyed to them all the railroad of the party of the first part (said railroad company), beginning at the city of Paducah, Kentucky, and ending at Memphis, Tennessee, as well that part of said railroad now constructed or completed as the part thereof which shall hereafter be constructed and completed; and all and singular the right of way of said company, and the lands, real estate, tracts, rails, bridges, buildings, depots, station-houses, shops, warehouses, structures, erections, fixtures and appurtenances thereunto belonging or in any wise appertaining, whether now possessed or hereafter to be acquired by the

8 party of the first part, * * * * and also all the franchises, rights and privileges, and all other corporate property, real and personal, of the party of the first part, belonging or appertaining to said railroad, whether heretofore acquired and now held or owned, or hereafter to be acquired by the party of the first part, including all depots, warehouses and structures, and all lands acquired or designed for depots, warehouses or structures, along the line of said railroad, whether now held and owned or hereafter to be acquired by said first party; that said conveyance was executed to them in trust for the purpose of securing a large amount of coupon-bonds issued and to be issued by said railroad company; that, as contemplated by said mortgage deed, a large amount of bonds had been issued by said company, amounting, principal and accrued interest, to the filing of said bill, to about the sum of one million nine hundred thousand dollars; that the company had made

9 default in payment of interest of said bonds, and that they said Calhoun and Meyer were entitled on behalf of the holders of said bonds to a foreclosure of said mortgage deed.

It is alleged by said Calhoun and Meyer that in behalf of the

holders of said bonds they have a first lien on all the rights and property embraced in said mortgage deed. On the 31st day of July, 1875, Allen was appointed receiver of the property of said company, with the usual directions to maintain and operate said road *pendente lite*, and as the Receiver of this Court he has ever since been in possession thereof, operating, controlling and managing the same under the orders of the Court.

Petitioners further show that they are judgment creditors of said railroad company by judgments recovered as follows, to-wit:

On the 27th day of January, 1875, petitioner, McDonald, recovered a judgment in the First Circuit Court of Shelby County,
10 Tennessee, against said railroad company for the sum $6,054.51 debt, and $16.65 costs of suit. On the 25th day of May, 1875, petitioner, McDonald, recovered in the same Court another judgment against said railroad company for the sum of $4,339.74 debt, and $15.70 costs of suit.

On the 3d day of June, 1876, petitioners, Martin Kelly and Thomas Coyne, partners under the name of Kelly & Coyne, recovered a decree in the Chancery Court of Shelby County, Tennessee, against said railroad company for the sum of $12,096.12 debt, and $——— costs of suit.

On the 9th day of January, 1875, petitioner, H. T. Ellett, recovered a judgment in the First Circuit Court of Shelby County, Tennessee, for the sum of $534.50 debt, and $15.05 costs of suit.

On the 13th day of October, 1875, one Wm. B. Gates recovered a judgment in said Circuit Court against said railroad company
11 for the sum of $1428.23 debt, and $14 costs of suit, which said judgment was, on the 31st day of May, 1876, for a valuable consideration, transferred to petitioner, Charles G. Fisher, and is held and owned by him.

On the 26th day of January, 1876, the Emmet Bank, of Memphis, recovered a judgment in said Circuit Court against said railroad company for $657.68 debt, and $15.75 costs of suit, which said judgment has been duly transferred and assigned to your petitioner, Chas. G. Fisher, and is now held and owned by him. Petitioners further state that said judgments remain wholly unsatisfied, except that the sum of $700 was paid to petitioner McDonald in the month of May, 1875, to be credited on one of his said judgments. Petitioners further show that the certificate of the proof or acknoweldgement of the execution of said trust deed to said Calhoun and Meyer
12 is as follows, to-wit:

"Be it remembered, that on this 5th day of February, "1872, before me, Charles Nettleton, a Commissioner, resident in "the City of New York, duly commissioned and qualified by the "executive authority and under the laws of the State of Tennessee "to take acknowledgments of deeds, etc., to be used or recorded "therein, personally appeared Ex. Norton, the President of the Pa-"ducah and Memphis Railroad Company, and Henry L. Jones, the "Secretary of said Company, who are personally known to me to be

"such; and who, being by me duly sworn, did depose and say that
"he, the said Ex. Norton, resided in the City, County and State of
"New York; that he, the said Henry L. Jones, resided in Paducah,
"in the State of Kentucky; that he, the said Norton, was President
"of the said Paducah and Memphis Railroad Company;
13 "that he, the said Jones, was Secretary of the said Com-
"pany; that they knew the corporate seal of said company;
"that the seal affixed to the foregoing instrument, purporting to be
"the corporate seal of said company, was such corporate seal; that
"it was affixed thereto by order of the Board of Directors of said
"company, and that they signed their names thereto by the like
"order, as the President and Secretary of said company, respect-
"ively; and the said Ex. Norton and Henry L. Jones also acknowl-
"edged to me that they executed said instrument, as their act and
"deed and the act and deed of said company, for the uses and pur-
"poses therein mentioned. And, at the same time and place, before
"me also personally appeared Philo C. Calhoun and L. H. Meyer,
"also parties to the foregoing instrument, with each of whom I am
"personally acquainted, who severally acknowledged that
14 "they executed the within instrument, for the purposes there-
"in mentioned."

A certified copy of said mortgage deed, and of the said certificate of proof or acknowledgement thereof, is already on file, and is proof in the cause; and petitioners beg leave to refer to the same as if filed with and as part of this petition.

Petitioners are advised that said certificate of proof and acknowledgment is fatally defective. As a certificate of acknowledgment it is defective, in that: it wholly fails to state, that the officer making the same had any personal acquaintance with said Ex. Norton and Henry L. Jones, by whom the said trust deed purports to have been executed in the name and behalf of said company. As a certificate of proof of the execution of said deed it is fatally defective, in that:

15 1. The said Ex. Norton and Henry L. Jones are not *subscribing* witnesses thereto.

2. They, the said Norton and Jones, do not prove that said deed was "executed"—the execution of a deed consisting as well of the delivery as of the signing thereof; and the said certificate fails to state that they deposed to any delivery of said deed, and state no proof equivalent to proof of its execution.

3. The said deed, purporting to have been executed by said Norton and Jones, as the officers and agents of said railroad company, they, the said Norton and Jones, cannot prove its execution *as witnesses*. They could, in the manner and form prescribed by the State of Tennessee, *acknowledge* its execution. But if proof by witnesses be the mode of probate adopted, that proof must be by *subscribing* witnesses, and such witnesses must, as petitioners are advised,
16 be persons other than the agents themselves, by whom the deed purports to have been executed.

Petitioners are advised that for these and other causes, the said cer-

tificate is fatally defective, and did not entitle said deed to registration under the statutes of the State of Tennessee; that said deed is, in contemplation of law, unregistered, and therefore null and void as to petitioners.

Petitioners are advised that they might have levied executions, issued upon their said judgments, on any of the property, real or personal, of said company that might be found within the State of Tennessee, and by a sale of the same under said levies, might have had satisfaction of their said judgments.

But they are advised that this course is forbidden to them by the fact that said property is in the hands of a Receiver, appointed by this Court, and their only remedy is by application to this Court for relief.

17 Petitioners further state that the said Paducah and Memphis Railroad Company is, and was at the date of the rendition of each of said judgments, the owner of a railroad running from the City of Memphis, in the County of Shelby, and State of Tennessee, to the town of Covington, in Tipton County, Tennessee; that said company is the owner in fee of the road-bed upon which its railroad track is laid; that said road-bed is fifty feet wide from said city of Memphis to said town of Covington; that between the said city of Memphis and said town of Covington said railroad is in operation, the track is cross-tied and ironed in the usual manner; that said railroad company is the owner in fee of various side-tracks, switches, depots and depot grounds, stationhouses, water-tanks, shops, warehouses, and the lands upon which the same are built, all on

18 the line of, appurtenant to, and used in connection with said railroad.

Petitioners are further advised that by virtue of their judgments aforesaid, they have or may acquire liens upon said property superior to the claim of title and lien set up under said trust deed to Calhoun and Meyer.

Petitioners file herewith, and as part of this petition, duly authenticated copies of their several judgments, marked respectively Exhibit A, Exhibit B, Exhibit C, Exhibit D, Exhibit E, Exhibit F and Exhibit G, * * to petition of Martin Kelly, et al.

Your petitioners would further state and show that the said Paducah and Memphis Railroad Company, notwithstanding the execution of the said alleged trust deed to said Calhoun and Meyer, by and with the knowledge and consent of said Calhoun and Meyer and of the said bondholders, remained in possession, occupation and

19 control of its said railroad, property and appurtenances until this Court took possession thereof by the appointment of a Receiver on, to-wit, the 31st day of July, 1875. And all of the said judgments were based upon and recovered for balances due to petitioners for work and labor done, and materials furnished to said company, in and for the construction of its said railroad between the city of Memphis and town of Covington, in Tipton County, Tennessee, said work and labor having been done and said materials fur-

nished in grading the road, building bridges and culverts, furnishing cross-ties and other usual and necessary work and materials in the construction of a railroad, and all of which was done and furnished prior to the appointment of said Receiver, and whilst said company remained in full control, possession and management of its said railroad, property and appurtenances, by and with the knowledge and consent of said Calhoun and Meyer and of said bondholders. Petitioners therefore pray that they may be permitted to sue out execution on their said several judgments and to levy the same on the aforesaid property, and that the said alleged trust deed to Philo C. Calhoun and L. H. Meyer may be adjudicated to be null and void as to the petitioners, because not legally proven and registered; that the said property of said railroad company in the possesion of the Receiver of the Court may be sold under the orders and decrees of the Court and the proceeds applied to the satisfaction of said judgments; and for such other and further relief as they may in equity be entitled to.

METCALF & WALKER,
Solicitors for Petitioners.

Personally appeared before me, H. E. Andrews, Clerk of the Circuit Court of the United States, for the District of West Tennessee, Martin Kelly, one of the foregoing petitioners, and made oath in due form of law that the foregoing petition is true to the best of his knowledge, information and belief.

It is agreed that the original petition, heretofore filed in this case by the petitioners above mentioned, has been lost from the files; that the foregoing is a substantial copy thereof, and it may be filed as a substitute for the original, and we waive any objection to said petition based upon the fact that the several petitioners have joined their respective cases in one petition.

PATTERSON & LOWE,
Attorneys for Trustees.

Endorsed: [No. 229 Equity.]

P. C. Calhoun and L. H. Meyer
vs. } Substituted Petition of Kelly, et al.
Paducah and Memphis Railroad Company.

Filed March 2, 1877.
H. E. ANDREWS, Clerk.
L. H. PILLSBURY, D. C.

METCALF & WALKER.

23 THIS INDENTURE

Made this first day of February, in the year one thousand eight hundred and seventy-two, between the Paducah and Memphis Railroad Company, a railroad corporation existing under the laws of the States of Kentucky and Tennessee, and formed by the consolidation of the Paducah and Gulf Railroad Company with the Mississippi River Railway Company, parties of the first part, and Philo C. Calhoun and Louis H. Meyer, of the City of New York, parties of the second part:

Whereas, The said Paducah and Gulf Railroad Company was incorporated under and by virtue of an Act of the General Assembly of the Commonwealth of Kentucky, entitled "An Act to incorporate the Paducah and Gulf Railroad Company," approved February 26, 1869, and owned the railroad which is now in operation from Paducah, in the State of Kentucky, to the line of the State of Tennessee, and also had the possession and control of that piece of railroad running from the said State line, in continuation of the said Paducah and Gulf Railroad, to Troy Station, in the State of Tennessee; and by the said Act of incorporation it was, among other things, provided that the said Paducah and Gulf Railroad Company might, the holders of a majority in value of all the stock therein concurring, agree on terms for consolidating said company with any other railroad company, on such terms as might be agreed upon; and by another Act of the General Assembly of the Commonwealth of Kentucky, entitled "An Act to amend the Charter of the Paducah and Gulf Railroad Company," approved March 9, 1871, it was, among other things, provided that that company be, and it was thereby authorized to consolidate with the said Mississippi River Railway Company on such terms as might be agreed upon between the two companies, and that it was thereby authorized to change its
24 corporate name and title to the Paducah and Memphis Railroad Company, and that in such name it should have all the powers and privileges theretofore conferred on said companies by the laws of the States of Kentucky and Tennessee; and further, that if said consolidation should take place between the said two railroad companies, under the name and title of the Paducah and Memphis Railroad Company, then said Paducah and Memphis Railroad Company was thereby authorized to issue and sell the bonds of the consolidated company, signed by the President and countersigned by the Secretary thereof, with the seal of the company affixed, and coupons for interest attached, and signed by the said secretary, to an amount not exceeding five millions of dollars, bearing interest at a rate not exceeding eight per cent. per annum, payable semi-annually, and the bonds and coupons to be payable at such place or places as the Directors of the said company might select, and the principal of the said bonds be payable at a period not exceeding thirty years from their respective dates; and that, in order to secure the prompt payment of the said bonds, the said consolidated company should have the power to execute a mortgage or deed of trust to a trustee or trustees upon the

main line of the railroad from Paducah to Memphis, and the other property, rights, privileges and franchises of said consolidated company, and that said mortgage or deed of trust should contain such stipulations as might be deemed necessary and effectual in securing the payment of the interest and principal of the said bonds at the maturity of the same.

And whereas, The said Mississippi River Railway Company was incorporated under and by virtue of an Act of the General Assembly of the State of Tennessee, entitled "An Act to Charter the Greenville and North Carolina Railroad Company, to amend the Charter of the Eagleville, Unionville and Shelbyville Turnpike Company, and to incorporate the Mississippi River Railroad Company, and for
25 other purposes," passed January 29, 1858; and was thereby, among other things, vested with all of the powers and rights necessary to the construction of a railroad from the city of Memphis, in Shelby County, Tennessee, to be run through said county of Shelby, Tipton, Lauderdale, and Obion to the State line of the State of Kentucky, in the direction of Cairo, in the State of Illinois; and it was, among other things, declared by the said Act that the same should be valid so far as relates to the State of Tennessee from and after its passage, and should take effect from and after its passage; and among the rights and powers conferred upon the said Mississippi River Railway Company by the said Act was the right and power to consolidate its road with any other railroad running in the same direction, in whole or in part, or connected with the line at either terminus, on such terms as might be agreed on between the contracting parties; and under and in pursuance of the power and authority conferred by the said Act, the said Mississippi River Railway Company commenced the construction of said railroad, and has partly constructed the same through the counties of Shelby, Tipton, Lauderdale, and Obion, in the State of Tennessee, toward the State line of Kentucky, in the direction of Cairo, in the State of Illinois.

And whereas, By an Act of the General Assembly of the State of Tennessee, entitled "An Act granting certain powers to existing railroad corporations," passed December 11, 1871, it was, among other things, enacted that every existing railroad corporation in the State of Tennessee, whether created under a general or special law, should have the right and power to borrow money, and to issue its bonds therefor, or for any other indebtedness or liability which it might incur or have incurred in the exercise of its lawful purposes, and to secure the payment of such bonds, with the interest thereon, by a mortgage of the whole or any part of its railroad and equipments and other property and franchises, containing such provisions as its Directors should approve; and also the power to consolidate
26 itself with any other railroad corporation whose road should connect with or intersect the road of such existing railroad corporation, or any branch thereof, and so to consolidate itself upon such terms and conditions and under such corporate name as should be agreed upon in writing between such corporations respectively:

Provided, however, That nothing in the said last-mentioned Act contained should affect or impair in any way any mortgage, right, lien, or priority of the State of Tennessee, or the rights of any creditors of such corporations, and that no such consolidation should be consummated or be complete until it and the terms and conditions thereof should have been approved by a majority of the stockholders of such consolidating companies respectively; and *provided, further*, that the agreement for such consolidation, together with the evidence of the approval thereof by such stockholders, should be filed in the office of the Secretary of State.

And, whereas, By a certain agreement in writing made by and between the said Paducah and Gulf Railroad Company of the first part, and the said Mississippi River Railway Company of the second part, and bearing date the fourteenth day of December, one thousand eight hundred and seventy-one, the said two companies, acting under and by virtue of the hereinbefore recited powers and authority, and under and by virtue of every other right, power, and authority which they or either of them had, covenanted and agreed to and with each other to consolidate themselves together into one railroad corporation for the purpose of owning, possessing, maintaining, and operating, under one organization, the said railroads, and all of the property, assets and effects of the said two railroad companies respectively, and of maintaining and operating under such organization a continuous line of railroad from Memphis, in the State of Tennessee, to Paducah, in the State of Kentucky, and so to
27 consolidate themselves together upon the terms and conditions set forth in the said agreement; and it was therein provided, among other things, that the corporate name and title by which the said consolidated company should be known and designated should be, "The Paducah and Memphis Railroad Company," by which name and title it should have, hold and possess all of the rights, powers, privileges and franchises, and all of the railroads and their rolling stock and equipments, and all of the other property, real and personal, whatsoever and wheresoever, of the said two railroad companies respectively, as fully and effectually as they respectively had, held, or possessed the same at the time of the entering into the said agreement; and that the said consolidated company should make and execute its bonds, in such form as its Directors should approve, for an amount altogether not exceeding in the aggregate seventeen thousand dollars of the gold coin of the United States a mile for each mile of said consolidated railroads from Paducah to Memphis, which bonds should be made payable not more than thirty years from date, and should bear interest at the rate of seven per cent. per annum, payable in like gold coin, for which coupons should be attached, payable in the city of New York, or elsewhere, as the Directors of the said consolidated company might prescribe; and that the said consolidated company should secure the payment of the principal and interest of the said bonds by a first mortgage of the said consolidated railroads throughout their entire length from Paducah to Memphis,

and all of the other property, real and personal, and the corporate franchises of the said consolidated company.

And whereas, At a meeting of the stockholders of the said Mississippi River Railway Company, duly and regularly called and held at the city of Memphis, in the State of Tennessee, on the ninth day of January, in the year one thousand eight hundred and seventy-two, at which meeting the holders of nine thousand and five
28 shares of the stock of that company (which was a large majority of all of the stock of said company), attended in person or by proxy, the said agreement for the consolidation of the said two railroad companies was submitted to the said stockholders, and thereupon they unanimously resolved to ratify and approve the same; and that the Directors of the said company be and they were authorized and directed to carry the same into effect, and to do all acts and things necessary or proper for that purpose, so as to effectuate such consolidation as speedily as practicable; and also at a meeting of the stockholders of the said Paducah and Gulf Railroad Company, duly and regularly called and held at the city of Louisville, in the State of Kentucky, on the fifteenth day of January, in the year one thousand eight hundred and seventy-two, at which meeting all of the stockholders of the said last-mentioned company attended in person or by proxy, the said agreement for the consolidation of the said two railroad companies was submitted to the said last-mentioned stockholders, and thereupon they likewise unanimously resolved to ratify and approve the same; and that the Directors of the said last-mentioned company be and they were authorized and directed to carry the same into effect, and to do all acts and things necessary or proper for that purpose, so as to effectuate such consolidation as speedily as practicable.

And whereas, The said agreement for such consolidation, together with the evidence of the approval thereof by the respective stockholders of the said two companies, has been filed in the office of the Secretary of State of the State of Tennessee, and a duplicate of such agreement, together with such evidence, has also been filed in the office of the Secretary of State of the Commonwealth of Kentucky, and the said consolidation has, by means of the premises, been consummated and completed.

And whereas, The said party of the first part has, in pursuance of the said agreement of consolidation, caused to be executed, un-
29 der its corporate seal and the signatures of its President and Secretary, its two thousand eight hundred and five bonds, for one thousand dollars each, all bearing even date herewith, and all of the same tenor, and which are numbered respectively from No. 1 to No. 2,805, inclusive, and are in the following form; that is to say:

No.—— } UNITED STATES OF AMERICA. { $——

First Mortgage Seven per cent. Bond, Principal and Interest payable in Gold, free of United States Taxes.

THE PADUCAH AND MEMPHIS RAILROAD COMPANY.

The Paducah and Memphis Railroad Company, a corporation created by and under the laws of the States of Kentucky and Tennessee, hereby acknowledges itself to be indebted to Philo C. Calhoun and Louis H. Meyer, of the city of New York, or to the bearer hereof, in the just and full sum of one thousand dollars of the gold coin of the United States of America, which sum it hereby promises and agrees to pay to them, or to the bearer hereof, in such gold coin, and of a standard not inferior to that of the present coinage of the United States, at the city of New York, on the first day of February, in the year one thousand nine hundred and two, and also to pay interest from the day of the date hereof upon the said principal sum at the rate of seven per cent. per annum, in semi-annual installments, on the first days of August and February in each year, upon presentation and surrender of the annexed coupons therefor, as they respectively become due and payable, which interest shall be paid in the city of New York, or in the city of London, England, as the holder of the coupon may from time to time elect; the amount to be so paid for each six months, interest being, if in New York, thirty-five dollars of such gold coin, and if in London, seven pounds, four shillings and five pence sterling; and such interest shall be so paid free from and without any deduction for any income or other tax which now is or may be hereafter imposed upon the same by any law of the United States of America, the said company hereby agreeing to assume and pay any such tax. In case of default in the payment upon demand of any of the said semi-annual installments of interest, and of the continuance of such default for six months thereafter, the principal of this bond will be thereupon subject to become due and payable, as provided in the mortgage or deed of trust hereinafter mentioned.

This bond is one of a series of two thousand eight hundred and five bonds of like tenor, date and amount, and numbered respectively from No. 1 to No. 2805, inclusively, and which amount together to two millions eight hundred and five thousand dollars, and the payment of which, with the interest to accrue thereon, is secured by a mortgage or deed of trust bearing even date herewith, duly executed by the said Paducah and Memphis Railroad Company to the said Louis H. Meyer and Philo C. Calhoun, as trustees, for the equal benefit of the owners or holders of the said bonds, and covering the entire railroad, completed and uncompleted, of the said railroad company, with its appurtenances, from Paducah, in the State of Kentucky, to Memphis, in the State of Tennessee, being one hundred and sixty-five miles in length; and all of the rolling-stock and equipments of the said railroad, whether now possessed or hereafter

to be acquired by the said company, and all real estate, rights of way, tracks, side-tracks, rails, bridges, depots, buildings, structures, fixtures, shops, tools, machinery or other property, real or personal, now held or hereafter to be acquired by the said company, for or in connection with the said railroad, and all of the rights, franchises, and privileges of the said company in relation thereto.

This bond shall pass by delivery or by transfer upon the books of the said railroad company at the option of its holder, and after a registration of ownership certified hereon by the transfer-agent or other officer of the company appointed for that purpose. No transfer, except upon the books of the company, shall be valid, unless the preceding transfer shall have been to bearer, in which case its transferability by delivery shall be restored. But this bond shall continue subject to successive registrations, and to transfers to bearer, at the option of each holder thereof.

In witness whereof, the said railroad company has caused
31 its corporate seal to be hereunto affixed, and this bond to be signed by its President and Secretary the first day of February, in the year one thousand eight hundred and seventy-two.

President.

Secretary.

And whereas, Each of the said bonds has attached to it coupons signed by the Secretary of the said party of the first part, for each semi-annual installment of interest to accrue thereon, payable when they respectively become due, either in the gold coin of the United States or in the sterling money of Great Britain, and either in the city of New York or in London, England, at the option of the holder thereof; and the better to identify the said bonds as those entitled to the benefit of the security afforded by these presents, each of them has indorsed upon it a certificate, signed by the said parties of the second part, in the words following; that is to say:

"We hereby certify that this is one of the bonds mentioned in the mortgage executed by the Paducah and Memphis Railroad Company to us, within referred to, and intended to be secured thereby.

Trustees."

And each of the said bonds is to have affixed to it the requisite amount of stamps required by the internal revenue laws of the United States.

And whereas, The said party of the first part is about to issue and negotiate the said bonds for the purpose of borrowing money thereupon, to be applied to the completion and equipment of the said railroad, and for its other lawful purposes.

Now, therefore, this indenture witnesseth, That the said party of the first part, in consideration of the premises and of one dollar to it paid by the said parties of the second part, and for the purpose of securing the payment of the said two thousand eight hundred and five

bonds to be issued and negotiated as aforesaid, with the interest to accrue thereon, in the gold coin of the United States of America, according to the true intent and meaning of the said bonds, *hath* granted, bargained, sold, aliened, remised, released, conveyed and confirmed, and by these presents *doth* grant, bargain, sell, alien, remise, release, convey and confirm unto the said parties of the second part and the survivor of them, and their and his successors, heirs and assigns forever, *all* the railroad of the party of the first part, beginning at and in the city of Paducah, in the State of Kentucky, and running from thence southerly the distance of one hundred and sixty-five miles, or thereabouts, through the counties of McCracken, Graves, Fulton and Hickman, in the State of Kentucky, and the counties of Obion, Dyer, Lauderdale, Tipton and Shelby, in the State of Tennessee, to the city of Memphis, in the said county of Shelby, in the said State of Tennessee, as well that part of said railroad now constructed and completed as the part thereof which shall hereafter be constructed and completed; and all and singular the right of way of said company, and the lands, real estate, rails, tracks, bridges, buildings, depots, stationhouses, shops, warehouses, structures, erections, fixtures and appurtenances thereunto belonging or in anywise appertaining, whether now owned and possessed or hereafter to be acquired by the party of the first part; *and also* all the locomotives, engines, tenders, cars, carriages, shop-tools and machinery, and all the franchises, rights and privileges, and all other of the corporate property, real and personal, of the party of the first part, belonging or appertaining to the said railroad, whether heretofore acquired and now held or owned or hereafter to be acquired by the party of the first part, including all depots, warehouses and structures, and all lands acquired or designed for depots, warehouses or structures, at either terminus or along the line of said railroad, whether now held and owned or hereafter to be acquired by the said party of the first part, and all continuations,
33 branches, tracks or extensions of said railroad to such depots, warehouses and structures; *and also* all the right, title and interest which the said party of the first part now has or may hereafter acquire under and by virtue of any lease to it, in, and to any other railroad branching from or connected with the said railroad of the said party of the first part hereinbefore described, or in and to any other property, real or personal, used or to be used by the said party of the first part in connection with its said railroad, or with any railroad leased by it as aforesaid; and all and singular the tolls, incomes, earnings and profits of the said railroad of the said party of the first part, and of any railroad leased by it as aforesaid; *and also* all of the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in, and to the same, and every part and parcel thereof, with the appurtenances. *To have and to hold* all and singular the above-mentioned and described premises, together with the appurtenances, unto the said parties of the second part, and the survivor of

them, and their and his heirs, successors and assigns forever, *in trust* for the security and benefit of all and every the person or persons, or bodies corporate who shall be or at any time become the holder or holders of the said two thousand eight hundred and five bonds, or such of them as shall be issued and negotiated by the said party of the first part, without preference to the holder of any of the said bonds over any of the others, by reason of priority in the time of issuing or negotiating the same, or otherwise:

Provided always, And these presents are upon the express condition, that if the party of the first part, or its successors or assigns, shall well and truly pay or cause to be paid to the holders of the said bonds, when and as the same shall become due and payable, the principal and interest moneys secured thereby, in the gold coin of the United States, according to the tenor and effect of the said bonds, then these presents, and the estate hereby granted, shall cease, determine, and be null and void.

34 *And it is covenanted and agreed*, by and between the parties hereto, that until default shall be made by the said party of the first part, its successors or assigns, in the payment of the principal or interest, or some part thereof, of the said bonds, or some one of them, the said party of the first part, its successors and assigns, shall be suffered and permitted to possess and enjoy the said premises, with their appurtenances, and all and singular the rights and franchises hereinbefore described, and to receive, take and use the tolls, income, earnings and profits thereof.

But if default shall be made in the payment of the principal or interest moneys mentioned in the said bonds, or any or either of them, or any part thereof, according to the tenor and effect, true intent and meaning of said bonds, and if such default shall continue for the period of ninety days, then and in that case the parties of the second part and the survivor of them, and their and his successors, are hereby authorized and empowered, at the request of the holder of any or either of the said bonds then outstanding, to enter into and upon, and take and hold possession of, all and singular the premises, estate, franchises, rights, privileges, and property hereby granted and conveyed, or intended so to be; and in person, or by one or more agents, to take, collect and receive the income, tolls, earnings and profits thereof, and apply such income, tolls, earnings and profits first to the payment of all taxes and assessments which shall be levied or assessed thereon or upon said premises, and all necessary repairs upon said property, and the expenses, costs, charges and counsel fees in the premises of the second parties of the second part, or the survivor of them, or their or his successors, and a reasonable compensation for their or his services, and next to the payment of the principal and interest of the said bonds, according to the tenor and effect thereof, as the same may be or may become due and payable. *And also*, if default shall be made in the payment of the principal or interest moneys mentioned in the said bonds, or any or either of them, or any part thereof, according to the tenor and

effect, true intent and meaning of the said bonds, and if such
35 default shall continue for the period of six months after demand duly made, then, immediately upon the expiration of such six months, (if such default shall have been made in the payment of interest), the whole principal money mentioned in and secured by the said bonds, together with the interest accrued thereon, shall become and be considered as due and payable, although the period limited for the payment thereof shall not then have expired; and thereupon the said parties of the second part, or the survivor of them, or their or his successors in the said trust, may and they and he are hereby authorized and empowered, upon the written request of the holder of any or either of the said bonds then outstanding, to cause the whole of said premises hereinbefore described, and hereby granted and conveyed, or intended so to be, with their appurtenances, and all benefit and equity of redemption of the said party of the first part, and its successors and assigns therein, to be sold at public auction in the city of New York or the city of Memphis, giving at least sixty days previous notice of the time and place of such sale, by publishing the same at least once in each week, during such period of sixty days, in two newspapers published in each of the said cities of New York and Memphis, and giving such other notice of such sale as may be required by law, if any other notice be so required.

And it shall be lawful for the said parties of the second part or the survivor of them, or their or his successors, making such sale, and they and he are hereby authorized and empowered, as the attorneys or attorney of the party of the first part, by these presents duly constituted and appointed for that purpose, to make, execute and deliver to the purchaser or purchasers on such sale all such deeds and conveyances as shall be necessary or proper to convey, and assure to and vest in him or them the said hereinbefore described premises, and every part and parcel thereof, and all of the estate, right, title and interest of the said party of the first part and its successors and assigns therein; and such sale, and the deeds and conveyances
36 so to be thereupon executed, shall be valid and effectual forever, and shall be a perpetual bar both in law and equity against the said party of the first part and its successors and assigns, and against all persons claiming or to claim the said premises, or any part thereof, by, from, or under it or them, or any of them.

And it is hereby declared and agreed that the said parties of the second part, or the survivor of them, or their or his successors in the said trust, shall, out of the proceeds of such sale, or of any sale which shall, under judicial proceedings or otherwise, be made of the said premises in enforcement of the security afforded by these presents, in the first place pay and retain the cost and expenses attending such sale, and all counsel fees and other expenses incurred by them in reference to the same, and a reasonable compensation for their or his own services in the premises; *and also* any balance which may be due to them or him on account of any disbursements or expenses

paid or incurred in and about the care and management of the said premises, subsequent to the taking possession thereof by them or him, including the reasonable compensation of any agent or agents who may be employed in or about such care and management, and shall apply the residue of the proceeds of such sale, or so much thereof as may be necessary, to the payment of the whole amount of principal and interest which shall then be owing and unpaid upon the said bonds, or any of them, whether the said principal, by the tenor of the said bonds, be then due or yet to become due.

And in case of a deficiency of such proceeds to pay in full the whole amount due or unpaid upon the said bonds, they shall be paid ratably in proportion to the amounts owing and unpaid upon them respectively, without preference of the holder of any one bond over any of the others; *and* any surplus which may remain after the full payment, as aforesaid, of the principal and interest of all of the
37 said bonds, shall be paid over to the said party of the first part, or its successors or assigns, upon lawful demand being made therefor.

And the said party of the first part doth hereby further covenant, promise and agree, that in case of any default on its part, as aforesaid, it will not set up, claim or seek to take advantage of any valuation, stay, extension, redemption, or other law or laws which may then exist, in order to prevent or hinder the enforcement or foreclosure of this mortgage, or the absolute sale of the said mortgaged premises as hereinbefore provided, without and free from appraisement, valuation, stay, right of redemption, or other condition or hindrance; but will, and hereby does waive the benefit of any and all such law or laws, and consents and agrees that a sale of the said mortgaged premises under these presents shall have immediate effect, and shall vest in the purchaser thereof an absolute title to the said premises upon the payment of the purchase-money by him, and the completion of his purchase.

And the said party of the first part, for itself, its successors and assigns, doth hereby covenant, grant, and agree to and with the said parties of the second part, and to and with the respective persons and corporations who shall at any time become holders of the said bonds hereby secured, or any of them, that the said party of the first part, its successors and assigns, shall and will at any time, and from time to time hereafter, upon request, make, do, execute and deliver all such further and other acts, deeds and things as shall be reasonably devised or required to effectuate the intentions of these presents, and to assure and confirm to the said parties of the second part, or the survivor of them, or their or his successors, all and singular, the property and estate, real and personal, hereinbefore described and hereby intended to be granted, and so as to render the same, and especially such portions thereof as shall be here-
38 after acquired by the said party of the first part, available for the security and satisfaction of the said bonds, according to the intent and purpose herein expressed.

And it is hereby mutually covenanted and agreed, by and between the parties hereto, that in case of the death or mental incapacity of either of the parties of the second part, or of his resignation of the said office of Trustee, the other of the said parties of the second part may, by an instrument in writing under his hand and seal, appoint a new Trustee in the place of him who shall so die, become incompetent or resign, and so from time to time, in case of the death, mental incapacity or resignation of either of the Trustees at the time being, his place may be filled in like manner by the remaining Trustee. But in case of neglect for the period of six months to appoint as aforesaid such new Trustee, at any time when a vacancy shall occur, the party of the first part may, by an instrument in writing, authorized by its Board of Directors and duly executed under its corporate seal, make such appointment: *Provided, however*, That no such appointment to fill a vacancy shall be made by either of the methods above prescribed until an opportunity shall have been afforded to the holders of the said bonds to take the necessary steps for calling a meeting, as hereinafter provided, for the purpose of designating a person to fill such vacancy; and if such a meeting shall be called at any time within the period of one month from the happening of such vacancy, or at any time thereafter before such vacancy shall have been actually filled, that no appointment to fill the same shall be made until after time fixed for the holding of such meeting; *and provided further*, that if the holders of said bonds shall at such meeting designate a person to fill such vacancy, he shall be appointed to fill the same in preference to any other person whomsoever.

And it is hereby covenanted and agreed that any new Trustee appointed as aforesaid shall immediately upon his appoint-
39 ment, and without any further act, deed, or conveyance, become and be vested with all of the estate, trust, rights, powers and duties of the Trustee in whose place he shall have been appointed; but, nevertheless, the respective parties hereto, and their respective successors and assigns, shall and will, upon request, make, execute and deliver all such releases, conveyances and assurances as shall be appropriate to vest in and confirm and assure to such new Trustee such estate, trust, rights, powers and duties according to the intent above expressed.

And it is further understood and agreed by and between the parties to these presents, that in case the parties of the second part, or the survivor of them, or their or his successors in said trust, shall, upon default made, take possession or make sale of the said premises in pursuance of the provisions hereinbefore contained, they shall be entitled to receive and retain from the income and proceeds of the said premises a reasonable compensation for their services in the care and management of the said premises, and a reasonable commission or compensation for the sale thereof as aforesaid.

And the said parties of the second part do hereby accept the trust conferred upon them by these presents, but with the understanding,

and it is hereby expressly provided and agreed, that neither of them shall be liable or accountable for the acts, default or neglect of the other, or of any agent or agents who may be appointed under or by virtue of, or for the purposes of these presents, to do any of the matters or things herein provided for, and that no other liability or responsibility shall, under any circumstances, be borne by or attach to either of them, than for the exercise of reasonable diligence only in the performance of the said trusts when action on their part for that purpose shall become necessary.

And it is further understood and agreed by and between the parties to these presents, that in case the parties of the second
40 part, or the survivor of them, or their or his successors in said trust, shall, upon default made, take possession or make sale of the said premises in pursuance of the provisions hereinbefore contained, all of the books and papers of the said party of the first part in any way relating to the said railroad or its equipment, or the operation or management of the same, shall upon request be delivered by the said party of the first part, its successors or assigns, to the said parties of the second part, or the survivor of them, or their or his successors in said trust at the time being; and that they by themselves, or any agent or agents employed by them, may take possession of such books and papers, and hold and use the same without any hindrance or impediment whatsoever by or on the part of the party of the first part, its successors or assigns, or of any person acting or claiming to act under it or them, or any of them.

And it is further understood and agreed by and between the parties hereto, that in case any holder or holders of the said bonds shall at any time, when a vacancy shall occur in the said trusteeship as hereinbefore contemplated, desire to call a meeting of the holders of the said bonds for the purpose of designating a person to fill such vacancy, he or they may call such meeting by publishing a notice thereof for at least six weeks in two of the daily newspapers printed in the city of New York, and for at least four weeks in two of the daily newspapers published in the city of London, England, specifying the time (which shall not be more than sixty days from the first publication of such notice) and place in the city of New York when and where such meeting will be held; and that if at such meeting the holders of a majority in amount of the said bonds then outstanding shall attend in person or by proxy, the same shall be held accordingly, and the said meeting shall, by the voice of the holders of a majority of the bonds represented at the same, have the right and power of designating a person to fill such vacancy, and it shall be filled accordingly.

41 *And it is further understood and agreed*, that the necessary and reasonable expenses of calling such meeting shall be paid upon request by the party of the first part to the parties of the second part, or the survivor of them, or their or his successors; and that any reasonable and proper expense which they may incur in calling any other meeting of the holders of the said bonds, for the purpose

of taking their instructions in regard to any matter or thing connected with the execution of the trusts, by these presents created, shall also be paid upon request by the said party of the first part.

In witness whereof, The said party of the first part has caused its corporate seal to be hereunto affixed, and these presents to be signed by its President and Secretary, and the said parties of the second part have hereunto set their hands and seals the day and year first above written.

[SEAL.] PADUCAH & MEMPHIS R. R. CO.

By EX. NORTON, President.
Attest: HENRY L. JONES, Secretary.

P. C. CALHOUN, [L. S.]
L. H. MEYER. [L. S.]

Sealed and delivered in the presence of

ANTHONY LANE,
CHARLES NETTLETON.

STATE OF NEW YORK, *City and County of New York.* } ss:

I, Charles Nettleton, a Commissioner of Deeds for the State of Kentucky, duly appointed and commissioned by the Governor thereof, for the State of New York, and authorized to take the acknowledgment of deeds, etc., do certify that the foregoing instrument from the Paducah and Memphis Railroad Company to Philo C. Calhoun and Louis H. Meyer, was this day produced to me, in my office in the said city of New York, by the said Philo C. Calhoun and Louis H. Meyer, and Ex. Norton, the President of said Company, and Henry L. Jones, the Secretary of the same Company; and
42 the said Ex. Norton and Henry L. Jones, being by me then and there duly sworn, did depose and say: that he, the said Ex. Norton, resided in the city, county and State of New York; that he, the said Henry L. Jones, resided at Paducah, in the State of Kentucky; that he, the said Ex. Norton, was the President of the Paducah and Memphis Railroad Company; that he, the said Henry L. Jones, was the Secretary of the same Company; that they knew the corporate seal of said Company; that the seal affixed to the foregoing instrument, purporting to be the corporate seal of said Company, was such corporate seal; that it was so affixed thereto by order of the Board of Directors of said Company, and that they severally signed their names thereto, by the like order, as the President and Secretary of said Company, respectively. And I do further certify, that the said instrument was then and there also acknowledged by the said Ex. Norton and Henry L. Jones to be their act and deed, and the act and deed of the said Paducah and Memphis Railroad Company; and I do also certify that the said instrument was then

and there acknowledged by the said Philo C. Calhoun and Louis H. Meyer to be their act and deed.

Given under my hand and official seal, this fifth day of
[SEAL.] February, A. D. one thousand eight hundred and seventy-two.

CHARLES NETTLETON,
Commissioner for Kentucky in New York,
117 Broadway, New York city.

STATE OF NEW YORK, }
City and County of New York. } ss:

Be it remembered, that on this fifth day of February, A. D. one thousand eight hundred and seventy-two, before me, Charles Nettleton, a Commissioner, resident in the city of New York, duly commissioned and qualified by the executive authority and under the laws of the State of Tennessee to take the acknowledgment
43 of deeds, etc., to be used or recorded therein, personally appeared Ex. Norton, the President of the Paducah and Memphis Railroad Company, and Henry L. Jones, the Secretary of the same Company, who are personally known to me to be such; and who, being by me duly sworn, did depose and say: that he, the said Ex. Norton, resided in the city, county and State of New York; that he, the said Henry L. Jones, resided at Paducah, in the State of Kentucky; that he, the said Ex. Norton, was the President of the said Paducah and Memphis Railroad Company; that he, the said Henry L. Jones, was the Secretary of the same Company; that they know the corporate seal of said Company; that the seal affixed to the foregoing instrument, purporting to be the corporate seal of said Company, was such corporate seal; that it was affixed thereto by order of the Board of Directors of said Company; and that they signed their names thereto, by the like order, as the President and Secretary of said Company, respectively. And the said Ex. Norton and Henry L. Jones also acknowledged to me that they executed the said instrument as their act and deed, and the act and deed of the said company, for the uses and purposes therein mentioned. And, at the same time and place, before me also personally appeared Philo C. Calhoun and Louis H. Meyer, also parties to the foregoing instrument, with each of whom I am personally acquainted, who severally acknowledged that they executed the said instrument for the purposes therein mentioned.

In witness whereof, I have hereunto set my hand and
[SEAL.] affixed my official seal, this fifth day of February, A. D. 1872.

CHARLES NETTLETON,
Commissioner for Tennessee, in New York,
117 Broadway, New York City.

44 [Endorsed.]

State of Tennessee—County of Shelby.

Filed for record March 9, 1872, at 3:40 o'clock p.m., noted in Note Book No. 7, page 121, and recorded this March 11, 1872.

JOHN BROWN, *Register.*

By J. C. BUSTER, *D. R.*

State of Tennessee, Shelby County—SCT.

I, John Brown, Register in and for the county and State aforesaid, do certify that on this day the foregoing mortgage from the Paducah and Memphis Railroad Company to Philo C. Calhoun and Louis H. Meyer, Trustees, together with the certificates thereon endorsed, authenticating the same, was received and lodged in my office for record at 3:40 o'clock p.m., on the 9th day of March, 1872, and entered on Entry Book No. 7, page 121, for registration; and I do further certify that this is the first mortgage of record in my
45 office from said company, and that I have truly recorded the same and the certificates thereon endorsed, together with this certificate, in my office, in Deed Book No. 87, page 9 and succeeding pages.

Given under my hand, this 11th day of March, A. D. 1872.

JOHN BROWN, *Register.*

46 To the Honorable the Circuit Court of the United States for the Western District of Tennessee:

Philo C. Calhoun and L. H. Meyer

vs.

The Paducah and Memphis Railroad Company.

[No. —— Equity Docket.]

The supplemental petition of Martin Kelly and Thomas Coyne, partners under the name of Kelly & Coyne, Donald McDonald, H. T. Ellett, Charles G. Fisher, and E. G. and J. C. Robinson, filed by leave of Court, this second day of March, 1877. The said petitioners respectfully show to the Court that on the 6th day of June, 1876, they filed their original petition herein, alleging that they were judgment creditors of the Paducah and Memphis Railroad Company, and claiming that the mortgage or trust-deed which the original bill in this cause was filed to foreclosure was not prop-
47 erly proven or authenticated for registration; that the registration of said mortgage or trust-deed was therefore null and void as against the judgments held by these petitioners, and that petitioners, by virtue of said judgments, had a lien on the property of said railroad company superior to the claim of title by said Calhoun and Meyer, under the mortgage aforesaid. Petitioners now further state that at the time of the filing of said petition, they prayed and obtained leave of the Court to issue executions on their said judgments, and to cause the same to be levied on the property of said

railroad company; but further proceedings on said executions were to be stayed until the further order of the Court. Under the leave of Court thus had, petitioners, on the 15th day of June, 1876,
48 caused executions to be issued on their said judgments, and on the same day they were levied on the following, as the property of said railroad company, to-wit: All the railroad and road-bed of said company lying in Shelby county, Tennessee, commencing in the city of Memphis, and running thence in a direction east of north to the southern boundary line of Tipton County, Tennessee, at a point where said boundary line is intersected by said railroad as it runs south from the town of Covington, in said county of Tipton; also upon the iron rails thereon, and the cross-ties upon which the same are laid, and upon the tracks, side-tracks, switches, bridges, depots, buildings, stationhouses, water-tanks, shops, warehouses, and the lands upon which the same are built or erected, in the county of Shelby and State of Tennessee, belonging to
49 said Paducah and Memphis Railroad or appurtenant to its said railroad. The two judgments alleged in said original petition, as held and owned by petitioner, Charles G. Fisher, were levied as aforesaid upon the above described property, and were also levied upon the following property, to-wit: A tract of land beginning at a point in the center of the main track of the Paducah and Memphis Railroad, where the center line of the road, known as the Old Randolph road, intersects said railroad; thence south 39° 45″ west (magnetic bearing), and with the center line of the railroad fifty-four and one-half feet, thence at right angles with the said railroad, and north 50° 15″ west (magnetic bearing) one hundered and fifty feet to a stake; thence at right angles to the course last given, and 50° 15′ east (magnetic bearing) two hundred and four feet to a point
50 on the east side of the railroad, and fifty feet distant from the center of the main track, thence southwardly and in a line parallel to the center line of the main track of the railroad, and fifty feet therefrom, about one thousand six hundred and fifty-one feet to the north boundary line of the Shelton tract; thence south 89° 45′ east (magnetic bearing,) and with said boundary one thousand three hundred and forty-five feet to a stake in the center of the Old Randolph road, and thence north 1° 15″ east (magnetic bearing,) and with the center of said road two thousand two hundred and fifty-six and a half feet to the beginning, containing forty-four acres more or less, and being the same property conveyed by Andrew H., and Mary J. Kerr to the Paducah and Memphis Railroad Company by deed registered in the Register's office of Shelby county, in
51 Book 98, page 77.

The executions held by petitioners, Kelly & Coyne, Donald McDonald, H. T. Ellett, and E. G. and A. J. Robinson, were also levied on said last-described property, but subject to the prior liens in favor of said Fisher. Excepting about 2¼ acres thereof occupied by the road-bed, and about —— acres occupied as a depot, said company does not and cannot use said 44 acres as necessary or

convenient to the operation of the road. Petitioners state that said property last above described was conveyed to said company on the 9th day of November, 1873, long subsequent to the execution of said trust deed to Calhoun and Meyer. They are advised that said Calhoun and Meyer, Trustees, have no title thereto under said trust deed for the reason (1) that the language and terms of said
52 trust are not sufficient to pass the title to said after-acquired property, the same not being used, or capable of being used in connection with, or as necessary or convenient to the operation of said railroad. Petitioners are advised that by virtue of said judgments and liens they have a specific lien on all the property so levied upon, and that because of the defect in the registration of said mortgage to Calhoun and Meyer, as alleged and shown in their original petition, their said lien is superior to the rights of said mortgagees.

They pray, as in their original petition, that your honorable Court will adjudge and declare that their said judgments are entitled to priority of satisfaction out of the proceeds of said property, whenever the same may be sold by the Court; and for such other
53 relief as they may be entitled to upon the facts stated.

METCALF & WALKER,
Solicitors for Petitioners.

[Endorsed:] [No. 229 Equity.]

Circuit Court of the United States, Western District of Tennessee.

P. C. Calhoun and L. H. Meyer
vs.
Paducah and Memphis Railroad Co.
Supplemental Petition of Martin Kelly, et al.
Filed March 2, 1877.

H. E. ANDREWS, Clerk.
By L. H PILLSBURY, D. C.

54 In the Circuit Court of the United States, for the Western District of Tennessee.

Philo C. Calhoun and Louis H. Meyer
vs.
The Paducah and Memphis Railroad Company.

The demurrer of Philo C. Calhoun and Louis H. Meyer to the original and supplemental petitions of Martin Kelly, Thomas Coyne and others, in the above styled cause.

These defendants show that the said petitioners have not, by their said petitions, made such a case as entitles them to the relief they ask, and they assign the following as causes of demurrer to said petition:

1st. It appears by the petitioners' own showing, that the mortgage set out in said petition was duly and properly authenticated
55 and registered long prior to the rendition of their said judgments.

2d. It does not appear by said petition that the petitioners are entitled to any priority as against the holders of the bonds secured by the mortgage set out.

3d. It conclusively appears from said petition and the mortgage therein set forth, that the holders of the bonds secured by said mortgage are entitled to priority of payment out of the property embraced in said mortgage.

4th. It conclusively appears from said petition and the mortgage therein set forth, and the authentication thereof, that any rights or priorities to which petitioners are entitled are subordinate to the rights and priorities of the bondholders.

PATTERSON & LOWE,
Solicitors for Calhoun & Meyer.

[Endorsed.] [No. 229 Equity.]

56 Circuit Court of the United States, Western District of Tennessee.

P. C. Calhoun and L. H. Meyer
vs.
Paducah and Memphis Railroad Company.

Demurrer of Calhoun and Meyer to petitions of Kelly, et al. Filed March 2, 1877.

H. E. ANDREWS, *Clerk.*
By L. H. PILLSBURY, *D. C.*

57 United States of America—Western District of Tennessee.

In the Circuit Court of the United States, within and for the Western District of Tennessee, in the Sixth Judicial Circuit thereof.

Proceedings had in said Court, at a regular term thereof, begun and held for its November term, A. D. 1876, at the United States Court House in the city of Memphis, in said District, on to-wit: the 22d day of March, A. D. 1877, in the following cause, to-wit:

Philo C. Calhoun, et al., [No. 229,] } Plaintiffs.
vs.
Paducah and Memphis R. R. Co., et al. } Defendants.

Came the petitioners, Martin Kelly, et al., this day, in open Court, and dismiss their original and supplemental petitions filed herein, so far as the same undertake to set up and claim a superiority of lien upon the forty-four acres of ground described in said petition, upon the special grounds in said petitions set forth; said dis-
58 missal being made by consent of parties and of the Court, without prejudice to the filing of a new and distinct petition in the cause setting up such claim and superiority of liens, leave being now given said petitioner, or any one of them, to file such petition.

convenient to the operation of the road. Petitioners state that said property last above described was conveyed to said company on the 9th day of November, 1873, long subsequent to the execution of said trust deed to Calhoun and Meyer. They are advised that said Calhoun and Meyer, Trustees, have no title thereto under said trust deed for the reason (1) that the language and terms of said
52 trust are not sufficient to pass the title to said after-acquired property, the same not being used, or capable of being used in connection with, or as necessary or convenient to the operation of said railroad. Petitioners are advised that by virtue of said judgments and liens they have a specific lien on all the property so levied upon, and that because of the defect in the registration of said mortgage to Calhoun and Meyer, as alleged and shown in their original petition, their said lien is superior to the rights of said mortgagees.

They pray, as in their original petition, that your honorable Court will adjudge and declare that their said judgments are entitled to priority of satisfaction out of the proceeds of said property, whenever the same may be sold by the Court; and for such other
53 relief as they may be entitled to upon the facts stated.

METCALF & WALKER,
Solicitors for Petitioners.

[Endorsed:] [No. 229 Equity.]

Circuit Court of the United States, Western District of Tennessee.

P. C. Calhoun and L. H. Meyer
vs.
Paducah and Memphis Railroad Co.
Supplemental Petition of Martin Kelly, et al.
Filed March 2, 1877.

H. E. ANDREWS, Clerk.
By L. H PILLSBURY, D. C.

54 In the Circuit Court of the United States, for the Western District of Tennessee.

Philo C. Calhoun and Louis H. Meyer
vs.
The Paducah and Memphis Railroad Company.

The demurrer of Philo C. Calhoun and Louis H. Meyer to the original and supplemental petitions of Martin Kelly, Thomas Coyne and others, in the above styled cause.

These defendants show that the said petitioners have not, by their said petitions, made such a case as entitles them to the relief they ask, and they assign the following as causes of demurrer to said petition:

1st. It appears by the petitioners' own showing, that the mortgage set out in said petition was duly and properly authenticated
55 and registered long prior to the rendition of their said judgments.

2d. It does not appear by said petition that the petitioners are entitled to any priority as against the holders of the bonds secured by the mortgage set out.

3d. It conclusively appears from said petition and the mortgage therein set forth, that the holders of the bonds secured by said mortgage are entitled to priority of payment out of the property embraced in said mortgage.

4th. It conclusively appears from said petition and the mortgage therein set forth, and the authentication thereof, that any rights or priorities to which petitioners are entitled are subordinate to the rights and priorities of the bondholders.

PATTERSON & LOWE,
Solicitors for Calhoun & Meyer.

[Endorsed.] [No. 229 Equity.]

56 Circuit Court of the United States, Western District of Tennessee.

P. C. Calhoun and L. H. Meyer
vs.
Paducah and Memphis Railroad Company.

Demurrer of Calhoun and Meyer to petitions of Kelly, et al.
Filed March 2, 1877.

H. E. ANDREWS, *Clerk.*
By L. H. PILLSBURY, *D. C.*

57 United States of America—Western District of Tennessee.

In the Circuit Court of the United States, within and for the Western District of Tennessee, in the Sixth Judicial Circuit thereof.

Proceedings had in said Court, at a regular term thereof, begun and held for its November term, A. D. 1876, at the United States Court House in the city of Memphis, in said District, on to-wit: the 22d day of March, A. D. 1877, in the following cause, to-wit:

Philo C. Calhoun, et al., [No. 229,] } Plaintiffs.
vs.
Paducah and Memphis R. R. Co., et al. } Defendants.

Came the petitioners, Martin Kelly, et al., this day, in open Court, and dismiss their original and supplemental petitions filed herein, so far as the same undertake to set up and claim a superiority of lien upon the forty-four acres of ground described in said petition, upon the special grounds in said petitions set forth; said dis-
58 missal being made by consent of parties and of the Court, without prejudice to the filing of a new and distinct petition in the cause setting up such claim and superiority of liens, leave being now given said petitioner, or any one of them, to file such petition.

And now came on this cause to be heard this day upon the demurrer of plaintiffs to the remainder of said petitions, original and supplemental, and the same having been argued by counsel on both sides, and considered by the Court, the same is sustained, and the Court being of opinion that the said trust deed to plaintiffs was duly and properly acknowledged and authenticated for registration.

The Court, therefore, doth order and adjudge that said demurrer be sustained, and said petition be dismissed at the costs of petitioners, for which let execution issue against them. From the fore-

59 going, the said petitioners, Martin Kelly, Thomas Coyne, Donald McDonald, H. T. Ellett, Chas. G. Fisher, and E. J. and J. C. Robinson, pray an appeal to the next term of the Supreme Court of the United States, to be held at Washington, in the District of Columbia, on the second Monday in October next, and the said Martin Kelly and other petitioners above named, having presented an appeal bond to the Court in the penalty of five hundred dollars, conditioned as required by statute, and it appearing to the Court, from the admission and consent of parties in open Court, that the value of the property upon which said trust deed and said levies were made and involved herein, is more than thirty-five thousand dollars, to-wit: more than the aggregate amount of the said judgment of petitioners, said appeal is granted and prayed for.

60 Supreme Court of the United States.

Know all Men by these Presents, We, Martin Kelly, Thos. Coyne, Donald McDonald, H. T. Ellett, Charles G. Fisher, and E. G. and J. C. Robinson, principals, and David Hastings, are held and firmly bound unto Philo C. Calhoun and L. H. Meyer in the sum of five hundred dollars, to be paid to the said Calhoun and Meyer, executors or administrators, to which payment well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors and administrators firmly by these presents.

Sealed with our seals, dated this 22d day of March, 1877.

Whereas, the above-named Martin Kelly, Thomas Coyne, Donald McDonald, H. T. Ellett, Charles G. Fisher and E. G. and J.

61 C. Robinson, have prosecuted an appeal to the Supreme Court of the United States to reverse the judgment rendered against them on the 22d of March, 1877, whereby the demurrer of Philo C. Calhoun and L. H. Meyers to the petitions of said Martin Kelly, et al., filed in the cause of Philo C. Calhoun and L. H. Meyer against the Paducah and Memphis Railroad Company, being No. 229 Equity, was sustained, and said petitions ordered to be dismissed, said judgment having been rendered in said cause on said date, in the said suit pending in the Circuit Court of the United States, for the Sixth Circuit, District of West Tennessee, at Memphis.

Now, therefore, The condition of this obligation is such, that if the above-named Martin Kelly and others shall prosecute their said appeal to effect, and answer all costs, if they shall fail to make

62 good their plea, then this obligation shall be void; otherwise to remain in full force and virtue.

MARTIN KELLY, [L. S.]
THOMAS COYNE, [L. S.]
DONALD McDONALD, [L. S.]
H. T. ELLETT, [L. S.]
C. G. FISHER, [L. S.]
E. G. AND J. C. ROBINSON, [L. S.]

By METCALF & WALKER,
Their Solicitors.

DAVID HASTINGS, Surety. [SEAL.]

Personally appeared before me David Hastings, who, being duly sworn, deposes and says he is worth the sum of one thousand dollars in unincumbered real estate, being in part the Central Hotel of Memphis.

DAVID HASTINGS.

Subscribed and sworn to before me this 22d day of March, 1877.

H. E. ANDREWS, *Clerk.*

I do hereby certify that the foregoing bond is sufficiently signed, and that the security is ample.

CONNALLY F. TRIGG, *U. S. District Judge.*

63 Endorsed. [229 Eq.]

Philo C. Calhoun et al.
vs.
The Paducah and Memphis Railroad Co.

[Appeal Bond.]
Filed March 22, 1877.

H. E. ANDREWS, *Clerk.*

64 Philo C. Calhoun and L. H. Meyer
vs.
The Paducah and Memphis Railroad Company and H. W. Smithers.

For the purpose of making the transcript of the record of the above cause, to be filed in the Supreme Court of the United States, on the appeal of Martin Kelly, Donald McDonald, and others, from the decree of the Court herein dismissing their petition, it is stipulated as follows:

1. The complainants, Calhoun and Meyer, on the 19th day of July, 1875, filed their original bill in this Court for a foreclosure by sale of the mortgage deed exhibited and filed with said petiton. By the prayer of said bill complainants asked that the said morgage or deed of trust might be decreed to be a first and paramount
65 lien upon all the property, real, personal and mixed, rights, franchises, powers, privileges and immunities, lands, titles, railroad, and rights of way of the said Paducah and Memphis Railroad Company. They prayed also for a Receiver, and for foreclosure by sale of the mortgaged premises, and that after deducting expenses and disbursements of complainants, the proceeds of sale be distributed to the holders of the bonds and coupons, and to the persons and parties claiming liens on the mortgaged premises, or claiming interests therein, according to their just order and priorities, as the Court might adjudge and decree.

Complainants alleged by their said bill that nineteen hundred and fifty-one of the bonds secured by said mortgage had been issued by said railroad company, executed and authenticated as pre-
66 scribed by the mortgage, which allegation was proven, and admitted by the petitioners, Kelly, McDonald and others, to be true.

2. On the 31st day of July, 1875, C. H. Allen was by the Court duly appointed and qualified as Receiver, and as such was put into possession of the railroad, its rolling-stock and property embraced in said mortgage, and since the date last aforesaid said Receiver has been in possession of and operating said railroad, under the orders, direction and control of the Court.

3. To the said bill of Calhoun and Meyer, the Paducah and Memphis Railroad Company and H. W. Smithers were made defendants, the said Smithers being so made a defendant upon the ground that he owned a large number of the bonds secured by said mortgage.

67 4. After the dismissal of the petitions of Martin Kelly and others, the said cause of Calhoun and Meyer against the Paducah and Memphis Railroad Company proceeded regularly to final decree of foreclosure, by sale of the mortgaged property, and the same was duly sold, and bought by H. W. Smithers, Charles J. Cander and J. T. Edmunds, Trustees for the holders of the bonds secured by said mortgage. Said sale was made and confirmed subject to and reserving the rights of said petitioners, Martin Kelly, et al.; and the said Smithers, Cander and Edmunds, Trustees, are now contesting the question of priority of lien with said Kelly and others.

5. The petitions of Martin Kelly and others were filed in said cause, as shown in the Record. It is agreed that a copy of
68 said petitions and of the orders and decrees of the Court specially relating thereto, together with a copy of this stipulation, shall constitute a full and sufficient transcript to be filed in the Supreme Court of the United States, the same constituting all of

the Record that is necessary to be sent to that Court to enable it to review the decree of this Court dismissing said petition.

PATTERSON & LOWE,
Solicitors for Meyer and Calhoun, Complainants in Original Bill.

GANTT, PATTERSON & LOWE,
Attorneys for Smithers, Edmunds and Cander, Purchasing Trustees, etc.

METCALF & WALKER,
Solicitors for Kelly and others.

[Endorsed.] [No. 229.]

Circuit Court of the United States, Western district of Tennessee.

P. C. Calhoun, et al.,
69 vs.
Memphis and Paducah Railroad Company.

Agreement of counsel.
Filed November 24, 1877.

H. E. ANDREWS, *Clerk.*
By L. H. PILLSBURY, *D. C.*

71 United States of America—Sixth Circuit and District of West Tennessee.

I, Horace E. Andrews, Clerk of the Circuit Court of the United States, for said District of West Tennessee, do hereby certify that the paper hereto attached is a full, true, perfect and correct copy of the original record and proceedings designated in the agreement of counsel herein filed in said Court as the same now appears of record and upon the files in my office, in the following cause, to-wit:

Philo C. Calhoun and Louis H. Meyer,
(Petition of Martin Kelly,)
vs.
Memphis and Paducah Railroad.

[SEAL.] In testimony whereof, I have hereunto set my name and affixed the seal of said Court, at office in the city of Memphis, this 28th day of November, A. D. 1877, and of the Independence of the United States the 102d year.

HORACE E. ANDREWS, *Clerk.*

———*D. C.*

Supreme Court of the United States.

P. C. CALHOUN & L. H. MEYER,

VS. } ON PETITION OF MARTIN KELLY, ET AL.

THE PADUCAH & MEMPHIS RAILROAD CO.

BRIEF AND ARGUMENT

OF

METCALF & WALKER,

FOR PETITIONERS.

MEMPHIS, TENN.:
Price, Jones & Co., Printers and Binders, 12 Jefferson Street.
1877.

SUPREME COURT OF THE UNITED STATES.

P. C. CALHOUN AND L. H. MEYER,

VS. { ON PETITION OF MARTIN KELLY, ET AL.

THE PADUCAH & MEMPHIS RAILROAD COMPANY.

ARGUMENT FOR PETITIONERS, MARTIN KELLY, ET AL.

STATEMENT OF CASE.

On the 19th day of July, 1875, the complainants, Calhoun and Meyer, filed their original bill in the Court below, alleging themselves to be trustees in a certain mortgage (the same exhibited with the petition of Kelly et al.) executed by the Paducah and Memphis Railroad Company to secure its first mortgage bonds.

On the 31st day of July, 1875, one C. H. Allen was appointed Receiver and put in possession of all the railroad property, with the usual powers of a railroad Receiver.—*Record*, p. 30.

Kelly and his co-petitioners are judgment creditors of the Paducah and Memphis Railroad Company. On the 6th day of June, 1876, they filed their petition in this cause, stating the recovery of their several judgments, the fact that all the property of the Company was in possession of a Receiver, and asking leave to levy their executions on said property.—*Record*, p. 5, *et seq.*

The leave having been granted, Kelly and others filed a supplemental petition on the 2d day of March, 1877, stating the levy of their several executions, and claiming, by virtue of their several judgments, executions and levies, priority of lien to the mortgage represented by the Trustees, Calhoun and Meyer.

The contest is between the mortgagees, represented by their

Trustees, Calhoun and Meyer, and these judgment creditors. The mortgage is prior in point of time to the judgments; and the question is whether it is well probated, and registered, so as to make it good against a subsequent creditor.

The mortgage concludes as follows:

"In witness whereof, the said party of the first part has "caused its corporate seal to be hereunto affixed, and these "presents to be signed by its President and Secretary, and the "said parties of the second part have hereunto set their hands "and seals, the day and year first above written.

"PADUCAH AND MEMPHIS R. R. CO.
"By EX. NORTON, *President.*"
Attest: HENRY L. JONES, *Secretary,*
[SEAL.] P. C. CALHOUN,
L. H. MEYER.

Sealed and delivered in the presence of

ANTHONY LANE,
CHARLES NETTLETON.

The certificate of probate is as follows:

"Be it remembered, that on the 5th day of February, 1872, "before me, Charles Nettleton, a commissioner resident in the "city of New York, duly commissioned and qualified by the "executive authority, and under the laws of the State of Ten- "nessee, to take acknowledgment of deeds, etc., to be used or "recorded therein, personally appeared Ex. Norton, the Presi- "dent of the Paducah and Memphis Railroad Company, and "Henry L. Jones, the Secretary of said company, *who are per- "sonally known to me to be such,* and who, being by me duly "sworn, did depose and say: That he, the said Ex. Norton, "resided in the city, county and State of New York; that he, "the said Henry L. Jones, resided at Paducah, Kentucky; that "he, the said Norton, was President of the said Paducah and "Memphis Railroad Company; that he, the said Jones, was "Secretary of the same company; that they knew the corpo- "rate seal of said company; that the seal affixed to the fore- "going instrument, purporting to be the corporate seal of said "company, was such corporate seal; that it was affixed thereto

" by order of the Board of Directors of said company, and that " they signed their names thereto by the like order, as the Pres- " ident and Secretary of said company respectively; and the " said Ex. Norton and Henry L. Jones also acknowledged to " me that they executed said instrument as their act and deed, " and the act and deed of said company, for the uses and pur- " poses therein mentioned.

"And at the same time and place, before me also personally " appeared P. C. Calhoun and L. H. Meyer, also parties to " the foregoing instrument, *with each of whom I am personally* " *acquainted*, and who severally acknowledged that they exe- " cuted the within instrument for the purposes therein men- tioned.

"CHARLES NETTLETON,
"*Commissioner, Etc.*"

The Court below was of opinion that the mortgage was well registered, and dismissed the petition of the judgment creditors, from which they have appealed to this Court.

I.

We presume it will not be questioned, that petitioners adopted in the Court below, a proper course for the presentation of their case. All the property of the road was in the hands of the Receiver. Petitioners could not levy upon and sell the same property without subjecting themselves to contempt proceedings. Their only remedy was to intervene in this cause, and submit their case to the judgment of the Court.

Wiswall vs. Sampson 14, How., 52.

II.

If the probate of the mortgage was defective, its registration was void, and the deed has no validity whatever as against the judgment creditors.

Code of Tennessee, Sec. 2075.

In Tennessee, the doctrine of notice, actual or constructive,

operates only as to a subsequent purchaser; it has no operation as to a creditor.

Stanley vs. Nelson, 4 Hum., 484.

By the positive enactment of Sec. 2075, the deed is absolutely "null and void" as to a subsequent creditor, unless registered. Constructive notice, by the filing of the bill or possession of the property, will not take the place of registration, as the statute positively requires registration and admits of no substitute for it.

III.

We have above set forth, *verbatim*, the Commissioner's certificate of the proof and acknowledment of the mortgage deed.

Is it sufficient to entitle the deed to registration under the laws of Tennessee? is the real question of the case.

This is a local and property question, to be determined according to the statutes of the State of Tennessee, and their construction by the Courts of that State.

Carpenter vs. Dexter, 8 Wall., 513.
Ross vs. McClung, 6 Peters, 283.
Green vs. Neal, 6 Peters, 291.
6 Wheaton, 119.
Elmendorf vs. Taylor, 10 Wheaton, 152.
12 Wheaton, 153.

By the Code of Tennessee it is enacted:

"Sec. 2005. No deed of conveyance for lands, in what manner or form soever drawn, shall be good and available in law, as to strangers, unless the same be acknowledged by the vendor, or proved by two witnesses upon oath, *in the manner* hereinafter prescribed, and registered by the Register of the county where the land lies."

"Sec. 2038. To authenticate an instrument for registration, its execution shall be acknowledged by the maker, or proved by two subscribing witnesses at least."

The certificate in question has the elements both of acknowledgment and proof, and it will conduce to the clearness of the argument to treat them separately.

First: as to its sufficiency as a certificate of acknowledgment by the maker.

By the Code of Tennessee it is enacted:

"Sec. 2042. If the acknowledgment be made before a clerk "or deputy-clerk of the County Court of this State, he shall "write upon, or annex to the instrument, the following certifi- "cate:

"State of Tennessee, }
"——— County. }

"Personally appeared before me, clerk (or deputy-clerk) of "the County Court of said county, the within named bargainor, "*with whom I am personally acquainted*, and who acknowledged "that he executed the within instrument for the purposes there- "in contained."

"Sec. 2043. If the acknowledgment be before a notary, "commissioner of the State, or a consul, minister or ambassa- "dor, he shall make the certificate under his seal of office."

The formula prescribed by Sec. 2042 must be followed whether the acknowledgment is taken by a clerk within the State, or by one of the officers designated in Sec. 2043, without the State.

Bone vs. Greenlee, 1 Cold., 29.
Mullins vs. Aiken, 2 Heisk., 547.

On the part of the judgment creditors, it is submitted that this certificate of acknowledgment is fatally defective, for that. *the Commissioner fails to state that he had any personal acquaintance with the persons by whom the deed purports to have been made.*

He certifies that "personally appeared Ex. Norton, the Pres- "ident of the Paducah and Memphis Railroad Company, and "Henry L. Jones, the Secretary of said Company, *who are per- "sonally known to me to be such.*"

Manifestly the sentence is elliptical. Supplying the omission according to the clear intention of the Commissioner, it would read, "personally known to me to be such *officers.*" He had just stated that they appeared before him as President and Secretary of said Company, and then proceeds to state that he per-

sonally knew them to be such officers. There is no antecedent to which the word "such" can refer, except the statement of the official character of Norton and Jones.

But whether or not the Court will say that it *does* mean such officers, is immaterial; it is entirely sufficient for us to show that it *may* mean that, or that it is *doubtful* what it means. The State Legislature has laid down a form to be followed in every respect—Section 2042, supra; the officer making the certificate must not leave his meaning to inference, or conjecture, however strong.

In the case of Peacock vs. Tompkins, 1 Hum., 135, the probate was, "the within deed of trust from Wm. Turner to R. H. "Lewis, Trustee, for the use and benefit of B. and J. H. Pey- "ton, was acknowledged by the said Turner, this 10th day of "July, 1837. Thos. Donoho, Clerk, etc." Held defective, because not stating a personal acquaintance with the bargainer; "the forms of certificate prescribed by the statutes in cases of "probate and acknowledgment must be substantially complied "with by the Clerk to make the registration effective." Page 140.

In the case of Garrett vs. Stockton, 7 Hum., 85, it was attempted to supply the omission of the "personal acquaintance" clause, by proof of the fact that on the same day the same grantor had acknowledged another deed before the same officer, and that in his certificate upon the latter deed, the clerk had stated his personal acquaintance with him. It was held that "our registration system is one of positive law, founded on "general grounds of public policy," and that "defective pro- "bates cannot be aided by the production of probates upon "other instruments *or other proof.*"

When the deed is proved by subscribing witnesses, the form for that mode of probate, Code, Sec. 2058, requires that the witnesses shall state their *personal acquaintance* with the bargainor. That he failed so to state was the point of objection in Brogan vs. Savage, 5 Sneed, 689; the probate was held defective. "The "wisdom of this requirement of the registration acts is palpa- "ble, and it is indispensable to prevent fraud and imposition.

" But it is *positive law, and cannot be disregarded.*" Page 692.

In Fall vs. Roper, 3 Head, 485, the Court declares that the omission of the words "with whom I am personally acquainted," was fatal to the probate; that their insertion is "one of the "most important requirements, as a protection against fraud, "contained in the *formula* prescribed by the statute."

The case of Henderson vs. Rice, 1 Cold., 223, involved the validity of an acknowledgment by a married woman. The statutory form required the certificate to state that the deed was acknowledged to have been executed "freely, voluntarily, with- "out compulsion, constraint or coercion by her husband." The certificate in question stated "that the said Jane Henderson ac- "knowledged the same to be her act and deed, and declared "that she had willingly signed, sealed and delivered the same, "and that she wished not to retract it."

The Court said: "The certificate is simply a nullity, and "the deed, as regards Mrs. Henderson, can have no legal effect "whatever.

"The ingenious argument that the certificate *implies* all that "is demanded by the prescribed form contained in the statute "is altogether fallacious. *A set form being prescribed, all im- "plication as to every material fact made necessary by the law, is "entirely excluded.*" p. 225.

In the case of Laird vs. Scott, 5 Heisk., 314, the question of the sufficiency of a married woman's acknowledgment came again before the Court. At page 350, the Court says: "In "the certificate of acknowledgment of the deed by Mrs. Barbiere, "the word 'voluntarily' was omitted. It is not easy to dis- "cover that the word 'voluntarily' has a distinct and different "meaning from the words 'freely, without compulsion, con- "straint or coercion by her husband;' and yet the Legislature "has required all these words to be used, in order to give valid- "ity to the conveyance. *We have no right to dispense with any "one of the requirements prescribed by the Legislature* to pass the "title of a married woman, *although it might appear to us that "such requirement was wanting in substance.*"

In the case of Harrison vs. Wade, 3 Cold., 505, the case of

Fall vs. Roper, 3 Head., 385, was commented on, and reaffirmed.

By these cases (and still others could be cited) it is thoroughly settled in Tennessee, not only that the omission of the personal acquaintance clause is fatal to the probate, but that the words " with whom I am personally acquainted " *can not be supplied by any sort of conjecture, inference, or implication.* They are required by positive enactment, too plain to admit of doubt, and which the Court will not qualify by allowing implication to take the place of express statement. As declared by this Court in Dean vs. Reid, 10 Peters, 527, " the Legislature hav- " ing made a distinction between the cases—whether it was in- " tentional or not, reasonable or unreasonable—the Court are " bound by the clearly expressed language."

We do not deem it necessary to cite other than Tennessee authorities on this question. Examination of the cases from other States will demonstrate that the decisions like those in Tennessee are very largely influenced by the consideration that a *form of certificate* is prescribed by statute. In the case of Carpenter vs. Dexter, 8 Wall., 513, almost the first proposition stated by the Court, in opening the discussion, is that the Illinois statute " did not " require the acknowledgment to be certified *in any particular* " *form;* " and it must be intended that the Court had this feature of the statute in mind when it declared that the deed, in all its parts, might be looked to in determining the sufficiency of the certificate. We submit that when the statute does prescribe a form, and does enact that the form must be substantially complied with, the certificate cannot be aided by reference to the deed, or otherwise; it must be complete in itself.

As said by the Court in Henderson vs. Rice, *supra*, neither intendment nor implication can be indulged, when the legislative act requires positive statement, and prescribes the very form and language in which it shall be made.

It is argued for the appellees that the case of Dexter vs. Carpenter, 8 Wall., 513, is conclusive of this case.

We have already pointed out one material difference, to-wit: that neither the Illinois statute of 1818, nor that of 1847, pre-

scribed any form of certificate—a fact which the Court observed in the very outset of its opinion, as seemingly to justify a more liberal construction of the certificate, than the Court would otherwise have allowed. But we are not forced to rely solely on that distinction; for we submit that if the certificate here had *in totidem verbis* contained what the Court there said was the meaning of the certificate, read in connection with the deed, it would still be insufficient, under the Tennessee statutes. At page 527 the Court states its conclusion thus: "Read thus "in connection with the deed, the certificate amounts to this: "that the grantor personally appeared before the officer, and in "his presence signed, sealed and delivered the instrument, and "then acknowledged the same before him. An affirmation in "the words of the statute could not more clearly express the "identity of the grantor with the party making the acknowl- "edgment."

Now, under the Tennessee statute, it is not sufficient for the officer, even in the clearest, most unmistakable terms, to state the identity of the grantor with the person making the acknowledgment. By the Tennessee form, the officer is required not only to state the fact of identity, *but also how he knows the fact;* if he knows it by personal acquaintance, that fact is to be stated; if he has not the necessary personal acquaintance, the statute prescribes the mode in which the person proposing to acknowledge the deed shall establish his identity.

Code, Sec. 2047, et seq.

In the case of Peacock vs. Tompkins, 1 Hum., *supra*, there was no defect in stating the identity, but the officer failed to state his personal acquaintance with the grantor; in other words, he failed to state *the mode of identification.*

In Johnson vs. Walton, 1 Sneed, 258, the certificate was complete, and conformed to the statute in every way, except that it omitted the personal acquaintance clause; it named the bargainors, and stated that they, the bargainors, personally appeared and acknowledged the deed; the statement of the fact of identity was perfect, but the Court said "this omission (the personal acquaintance) being a matter of *substance,* is, therefore,

fatal to the probate of the deed;" and also said "this omission is not remedied by either of the acts referred to," to-wit: Code, 2080.

The manifest purpose of the statute is, that if the officer be proceeded against for willfully making a false certificate of identity, he shall not escape by an averment that he was imposed upon by false representations. Hence he is required to state that he has personal knowledge of the fact of identity, or, failing that, that it is proved by witnesses having such personal knowledge. The statute intended to give a remedy against the officer for a false statement of the personal acquaintance, as well as for a false statement of identity. Tried by this test, would it be possible to proceed against this commissioner for falsely stating a personal acquaintance with the party making the acknowledgment? Could he not answer, that so far from stating that fact, he had carefully refrained from stating it? For, looking further into the certificate, and coming to that part in which the acknowledgment by the trustees is certified, *we find that the officer, with the utmost exactness, adheres to the Tennessee form*, showing that he had the form before him, and was able to follow it so far as the trustees were concerned, but emphasizing his inability to do so, in respect to the acknowledgment by the railroad officers.

Had the certificate read "personally known to me," and there stopped, it might well be held to be in conformity with the statuatory form, but by adding "to be such," the officer evinces a determination to confine his statement to what he conceived to be the extent of his knowledge, to-wit: the fact that one Ex. Norton and one H. L. Jones were respectively the President and Secretary of the Paducah and Memphis Railroad Company. We might strengthen the position that the certificate not only leaves it in doubt, but adds to the doubt, that the Commissioner has been unable to certify to a "personal acquaintance": the fact that he omits the other words of the statute, that the "*within named bargainors*" personally appeared, from which it seems that the Commissioner was willing enough, in his judgment and according to his own conception,

to state that he personally knew that Ex. Norton and H. L. Jones were the President and Secretary of the Paducah and Memphis Railroad, and yet he was unwilling to state that he was personally acquainted with the persons who appeared before him, as being the Ex. Norton and H. L. Jones, who were the President and Secretary of said road.

The certificate can only be sustained by an assumption that the deed being executed by the agent or attorney in fact of a corporation, is to be acknowledged in some form different from that prescribed for the deed of an individual, executed by an attorney in fact. The legislative history of Sec. 2038 of the Code shows very conclusively (if such showing be necessary) that in using the words "by the maker" the Legislature intended to cover the case of a deed by an attorney in fact.

Note to the section in Thompson & Steger's Code.

No reason can be conceived why the statutory form should not apply to a corporation deed, executed by an agent or officer, as well as to the deed of an individual, so executed.

In either case the purpose of the statute is to prevent, as far as possible, an imposition upon the officer by a false personation of "the maker," or fraud by the officer, and an effort to escape the consequences thereof, by pretending that he was imposed upon. He is required, therefore, to certify his personal acquaintance with the maker.

The case therefore narrows itself to this:

Is it sufficient for the officer in the case of a deed of an individual, executed by an attorney in fact, to omit the personal acquaintance clause, and certify in lieu thereof that he personally knows that the person appearing before him as the attorney in fact was such attorney? Is it not manifest that the authority to execute the deed is one thing, and the identification of the person of the attorney quite another? And that the latter is the thing to be done by the officer taking the acknowledgment, and the former is a matter to be proved *aliunde* and with which he has nothing to do?

Should the officer state that a deed was acknowledged by A. B., the agent of C. D.; that he was personally acquainted with said A. B., and, also, knew that he was agent for C. D., it is clear that in stating the personal acquaintance, and the agency, he would be stating two separate, distinct facts, the statement of either of which would not involve any statement or knowledge of the other. There is no connection between them. The fact that an agency exists is one thing, and that he is personally acquainted with the agent is another. The fact of a personal acquaintance with an individual, required by the statute to be certified, is a very simple one, which the officer must know, and about which he cannot honestly make a mistake; whereas, his ability or non-ability to state a personal knowledge of his agency, or, in this case, of his official character, is a difficult and complicated fact, which the officer making the certificate might suppose that he personally knew, but might not so know, if he were subjected to a cross-examination. It would be a very wide departure from the statute, to allow the officer to *substitute* the statement of a knowledge of the official character of a person, as to which there is so much latitude of judgment, complexity of facts, and a possibility of misconception on his part, as to what constitutes a personal knowledge of such a fact, for a statement of the simple, inartificial fact of a *personal acquaintance with the person*, and about which he cannot make an honest mistake.

IV.

Passing from the question of the sufficiency of the certificate of acknowledgment by the makers of the deed, let us look at it as a certificate of proof of its execution.

In this aspect the objections to it are more palpably fatal than those we have already urged against its sufficiency as a certificate of acknowledgment.

a. The deed must either have been acknowledged by the maker, or its execution proved by *two subscribing* witnesses.

Code, 2035.

If the depositions of Norton and Jones, as set out in the cer-

tificate, may be looked to as proof by witnesses, they certainly are not proof by *subscribing* witnesses.

b. A certificate of proof by witnesseses must show the *personal acquaintance* of the witness with the maker.

Code, 2058.

Fall vs. Roper, 3 Head., 385.

Harrison vs. Wade, 3 Cold., 505.

To sustain the certificate as a sufficient statement of proof of execution would involve the singular anomaly of establishing, by the maker's oath, that which should be established by his simple acknowledgment, if he is to be the medium of proof; and the still greater anomaly of establishing, by his own oath, his acquaintance with himself.

White vs. Denman, 1 Ohio State, 115.

V.

We have thus far treated the question as if the deed had been made by an individual; being, in fact, made by a corporation, the question arises whether the principles of decision upon which we insist apply.

We might, we suppose, safely dismiss this question by saying that the case is the same as the deed of an individual executed by an attorney in fact; that in such case the attorney or agent is "the maker" of the deed within the meaning of the statute; and that the officer must certify his personal acquaintance with the attorney; the question of his actual authority to represent his alleged principal being left to proof outside the certificate, as affecting the validity and operation of *the deed itself*, but not affecting the sufficiency of the authentication *for registration.* Authorities on the question, however, are not wanting.

The New York Act of April, 1813, required that a deed of real estate, to entitle it to be recorded, must be acknowledged by the party executing the same, or be proved by a witness thereto. Under this statute, it was held: "Where a deed is "executed by the attorney of the grantor, lawfully authorized, "he is the party executing the same, who may make the ac-

"knowledgment; and such has been the uniform construction "of the statute. So also the officer or agent of a corporation, "who executes a deed in the name of a corporation, by affixing "thereto the impression of the common or corporate seal, en- "trusted to his care, is *the party executing the deed;* as it is im- "possible that a corporation aggregate should execute or ac- "knowledge a deed in person."

Lovert vs. Steam Saw Mill, 6 Paige, 60.

In the case of Merrill vs. Montgomery, 25 Mich., 73, it is said: "Presumptively, if the seal is evidence of authority, the "cashier, who is usually the keeper of the seal, must be the "proper person to affix it, and the act or acknowledgment of "any other person would be superfluous. The object of ac- "knowledgment is to obtain an official recognition of *the person* "whose act gives the deed its corporate character, as an act of "the bank."

"The authority of a person, other than the grantor himself, "to execute and deliver a deed must, of necessity, be made out "by proof *aliunde*, and a recital of authority in the deed itself "does not dispense with this necessity."

Hart vs. Stone, 30 Conn., 96.

In the case of Isham vs. Bennington Iron Company, 19 Vt., 230, it was held:

1. That to entitle a deed (purporting to be executed by a corporation) to registration, it must be executed according to the *statute* requisites, by which the registry of deeds is established; it is not sufficient that it is executed merely according to the requirements of the common law.

2. That under a general statute of Vermont, not in terms applying to corporations, the deed must be *signed* as well as *sealed;* and that the person who signed and sealed *was also the proper person to acknowledge it.* pp. 252–253. In this case Redfield, J., made a remark very pertinent to the case in hand, when he said that the persons having charge of the matter seemed to be at great pains to have the probate conform to the laws of New York, instead of those of Vermont; so here, the Commissioner seems to have been at great pains to make his

certificate conform to the laws and decisions of New York, or some other law, wholly ignoring those of Tennessee.

The statute of Tennessee in respect to the execution of deeds, and their authentication for registration, is in terms universal in its application; it makes no exception of deeds by corporations; it enacts that "*no* deed of conveyance for lands shall be "good and available in law, as to strangers, unless the same be "acknowledged by the vendor, or proved," etc., and that "to "authenticate an instrument for registration, its execution shall "be acknowledged *by the maker*, or proved by *two subscribing* "witnesses at least."

Code, 2005, 2038.

"*Any* of said instruments not *so* proved or acknowledged and registered, or noted for registration, shall be null and void as to existing or subsequent creditors."

Code, 2075.

Assume that the company had, by vote, duly authorized Norton and Jones to execute this mortgage deed, there was no possible difficulty in their acknowledging, or in the officer certifying their acknowledgment, as in the case of the deed of an individual, executed and acknowledged by an agent. The power of the agent must be proved *aliunde;* but, being proved, the officer's certificate will show its exercise. Assuming the power, it is as necessary that the officer should state his personal acquaintance with the agent, as he would do in taking the acknowledgment of the principal; the object is the same in either case, to-wit, to state not only the identity of the person making the acknowledgment, with him who executed the deed,but also *the evidence of that identity*, to-wit, by personal acquaintance with him. Thus executed and acknowledged, the production of the power of attorney, when the authority of the agent or attorney in fact is questioned, together with the certificate to the deed which he may have made under the power, if in proper form, will prove the actual execution of the deed by one duly authorized to do so.

VI.

Without regard to the questions we have discussed, it was error to dismiss the petition of the judgment creditors. Admitting the sufficiency of the certificate of probate, the deed being executed by the agent of a corporation, *it still remained for the complainants to prove the authority of that agent.* That proof, if it exists, is to be found primarily in the records of the railroad company. The deed may be well registered, and at the same time wholly inoperative for want of authority in the agent to execute it.

The fact of authority remained to be made out by complainants at the final hearing.

METCALF & WALKER,
S. P. WALKER,
Of Counsel for Petitioners.

IN THE

Supreme Court of the United States

P. C. CALHOUN AND L. H. MEYER
vs.
PADUCAH & MEMPHIS R. R. CO. AND H. W. SMITHERS.

No. .....

BRIEF

—OF—

Gantt, Patterson & Lowe,

COUNSEL FOR DEFENDANTS IN ERROR.

In the Supreme Court of the United States.

P. C. CALHOUN AND L. H. MEYER
vs.
PADUCAH & MEMPHIS R. R. CO. AND H. W. SMITHERS.

It is conceded that where the probate or acknowledgment of a deed or other instrument required to be registered, is taken without the limits of the State, it must conform to the provisions of the statutes of Tennessee on that subject.

Bone vs. Greenlee, 1 Cold., 29.

The only form prescribed by the Code of Tennessee for the acknowledgment of a deed by the maker will be found in the following section taken from the Act of 1831:

"2042. If the acknowledgment be made before a Clerk or Deputy Clerk of the County Court of this State, he shall write upon or annex to the instrument the following certificate:

STATE OF TENNESSEE,
——— County.

Personally appeared before me, ——— Clerk, (or Deputy Clerk) of the County Court of said County, the within named bargainor, with whom I am personally acquainted, and who acknowledged that he executed the within instrument for the purposes therein contained.

WITNESS, my hand at office, this —— day of ——— 18—."

It will be perceived that this *formula* is too narrow and restricted for its literal phraseology to be adapted to acknowledgments taken before any other officer than the one therein named or his deputy.

Section 2039 of the Code confers the power to take acknowledgments upon Notaries Public of Tennessee.

Section 2040 prescribes before whom acknowledgments may be taken without the limits of Tennessee and within the limits of the "Union or its Territories."

Section 2041 in like manner prescribes before whom they may be taken in foreign countries.

It is evident that none of the officers named in sections 2039, 2040 and 2041 could literally adopt the form incorporated in section 2042. They could only adopt *its substance* and conform the wording of the certificate to the circumstances of each particular case.

Again, there is no form prescribed in Tennessee for the acknowledgment of a deed by a corporation. It would be absurd to certify that a corporation "*personally appeared,*" or to style its agent "*the within named bargainor,*" or for the officer to state that he was "*personally acquainted*" with the corporation.

Nettleton, the Commissioner who took the acknowledgment of the Paducah and Memphis Railroad Company to the mortgage in question, was no doubt familiar with the statutes of Tennessee on this subject, as shown by his certificate, but was at a loss to know how he could literally conform it to the *formula* prescribed by section 2042, so far as the corporation was concerned, and hence his great care to embody in his certificate the substance of everything that could go to make up a full and complete acknowledgment of the corporation by its authorized agents, that the mortgage was its act and deed.

This Court in a case involving the validity of a certificate of acknowledgment, has said: "It is the policy of the law to uphold

certificates when *substance* is found, and not suffer conveyances or the proof of them to be defeated by technical or unsubstantial objections."

Carpenter vs. Dexter, 8 Wall., 526.

The policy of the law is not otherwise in Tennessee. Section 2080 of the Code expressly provides that a deed "shall be valid if the substance of the authentification required by law is in the certificate."

The Supreme Court of Tennessee in more than one case has adjudicated that substance, and not form, was all that was necessary to constitute a valid probate of a deed.

Johnson vs. Walton, 1 Sneed, 258.
Fall and Cunningham vs. Roper, 3 Head., 485.

Section 2058 of the Code prescribes the form where the authentication of the instrument is established by the proof of witnesses. In construing this section in connection with section 2080, the Court held that the omission from the certificate of the words "*in their presence*" did not render the probate defective.

Farquharson vs. McDonald, 2 Heisk., 404.

It is conceded that the registration laws of Tennessee require the certificate to show the personal identity of the maker of the instrument, and that the Supreme Court of that State has held that the words "personally appeared" are not the equivalent in substance of the words "with whom I am personally acquainted." Both of these expressions are to be found in the form prescribed in section 2042, and the Court correctly held that the latter meant something more than the former, and was intended to mean that the officer had personal knowledge of the individual making the deed.

Peacock vs. Tompkins, 1 Humph., 135.
Garrett vs. Stockton, 7 Humph., 84.
Johnson vs. Walton, 1 Sneed, 258.
Bone vs. Greenlee, 1 Cold., 29.

The certificate to the mortgage of the Paducah and Memphis Railroad Company is as follows:

"STATE OF NEW YORK,"
"City and County of New York,"
"Be it remembered, That on this fifth day of February, A. D."
"1872, before me, Charles Nettleton, a Commissioner in the City"

"of New York, duly commissioned and qualified by the executive"
"authority and under the laws of the State of Tennessee, to take"
"the acknowledgment of deeds, &c., to be used or recorded"
"therein, personally appeared Ex. Norton, the President of the Pa-"
"ducah and Memphis Railroad Co., and Henry L. Jones, the Sec-"
"retary of the same Company, who are personally known to me"
"to be such; and who being by me duly sworn, did depose and"
"say, that he, the said Ex. Norton, resided in the City, County"
"and State of New York; that he, the said Henry L. Jones,"
"resided at Paducah, in the State of Kentucky; that he, the said"
"Ex. Norton, was the President of the said Paducah and Mem-"
"phis Railroad Company; that he, the said Henry L. Jones, was"
"the Secretary of the same Company; that they knew the cor-"
"porate seal of said Company; that the seal affixed to the fore-"
"going instrument purporting to be the corporate seal of said"
"Company was such corporate seal; that it was affixed thereto"
"by order of the Board of Directors of said Company, and that"
"they signed their names thereto by the like order, as the Presi-"
"dent and Secretary of said Company respectively; and the said"
"Ex. Norton and Henry L. Jones also acknowledged to me"
"that they executed the said instrument as their act and deed,"
"and the act and deed of the Company, for the uses and purposes"
"therein mentioned. And at the same time and place, before me,"
"also personally appeared Philo C. Calhoun and Louis H. Meyer,"
"also parties to the foregoing instrument, with each of whom I"
"am personally acquainted, who severally acknowledged that they"
"executed the said instrument for the purposes therein mentioned."

{ SEAL } "*In Testimony Whereof*, I have hereunto set my hand"
"and affixed my official seal this 5th day of Febru-"
"ary, A. D. 1872."

"CHARLES NETTLETON,
"*Commissioner for Tennessee, in New York,*"
"*117 Broadway, New York City.*"

It will be observed that in the certificate of Nettleton, the Commissioner taking the acknowledgment, we have the words "*personally appeared,*" and instead of the words "*with whom I am personally acquainted;*" we have their equivalent in the words "*who are personally known to me.*" It would be hypercritical to attempt to draw a distinction in the meaning of these terms—one is the counterpart

of the other. The substance is the same, and this Court has said, adopting the language of the Supreme Court of Pennsylvania, that "when substance is found, it is neither the duty nor the inclination of the Court to defeat conveyances by severe criticism of language."

Carpenter vs. Dexter, *supra.*

Counsel for plaintiffs in error lays stress upon the words "*to be such,*" and contends that the fair construction of the term "*who are personally known to me to be such,*" is, that the Commissioner had no personal knowledge of the men who appeared before him, but only knew historically or by general reputation, that Norton was the President and Jones was the Secretary of the Company. Obviously, this is not the meaning. The adverb *personally* excludes any other hypothesis except that of personal acquaintance.

Norton and Jones appeared before the Commissioner officially, and he was dealing with them as the agents of the Company, duly authorized to make the acknowledgment. If he had merely certified that they were personally known to him as individuals, we submit that the certificate would have been much more obnoxious to criticism than it is now. In that event, it might, with more plausibility at least, be argued that personal acquaintance with them as individuals, did not exclude the idea that he was unacquainted with them officially. On the other hand, when he certifies that they are personally known to him as such officers, the idea is excluded that he had no knowledge of them as individuals. It is not conceivable how he could personally know them as officers of the Paducah and Memphis Railroad Company, without personal knowledge of them as individuals. We submit that the Commissioner was not only accurate but particularly fortunate in the selection of language to convey his meaning.

By reference to the mortgage, page 22 of the Record, it will be seen that the Commissioner who took the acknowledgement, also witnessed the execution of the deed by Norton as President, and Jones as Secretary of the Company. Much importance is attached to this circumstance in the case of Carpenter vs. Dexter, *supra*, where this Court said that no "affirmation in the words of the statute could more clearly express the identity of the grantor with the party making the acknowledgment." There is nothing in the case

of Garrett vs. Stockton, 7 Humph., 84, that conflicts with the opinion of this Court as to the weight to be attached to this circumstance appearing upon the face of a deed alleged to have been defectively acknowledged. In the latter case it is only held that the Court will not look to the certificate of acknowledgment annexed to a deed in order to supply the defect in the certificate of acknowledgment annexed to another and different deed, although both deeds were executed and acknowledged before the same officer on the same day. To hold that the Court will not look beyond the deed to some other instrument, is very different from holding that the Court will not look to the deed itself.

There is another reason why the case made by plaintiffs in error is fatally defective, independent of the validity of the registration of the mortgage. Their petition shows affirmatively that their judgments were all rendered, and their supposed liens were all acquired subsequent to the time the bill was filed to foreclose the mortgage. By reference to sec. 2072 of the Code of Tennessee it will be seen that an unregistered deed or mortgage "shall have effect between the parties to the same." The bondholders then had a valid and subsisting lien on the property covered by the mortgage, and default having been made, they had the right to call upon the trustees named in the mortgage to file a bill in a Court of Equity to foreclose. When the bill was filed, the property embraced in the mortgage and described in the bill was empounded for the benefit of the bondholders, and thereafter the pendency of the suit operated as notice to "all the world" of their lien. In speaking of the doctrine of *lis pendens*, the Supreme Court of Tennessee in the case of Shelton vs. Johnson, 4 Sneed, 672, said that "any interest acquired in the subject matter of a suit while it is pending would be regarded as a nullity as to the plaintiff's title which may be established by a judgment or decree in the suit."

No subsequently acquired rights can be intervened that will defeat a lien to enforce which the suit was instituted.

It is conceded that a lien created by an unregistered mortgage must give way under section 2075 of the Code to the lien of a judgment creditor subsequently acquired, no matter whether such creditor had notice of such prior lien or not; but this is not the rule when a bill has been filed in equity to foreclose the mortgage.

We submit that whatever rights the defendants in error had at the time their suit was instituted to foreclose the mortgage, must of necessity still exist, and that no subsequent creditor or encumbrancer can by interposing defeat the equities of their bill. Would it be said that where a vendor had conveyed land by an absolute deed and afterwards filed a bill to enforce the vendor's lien on the property, that a creditor of the vendee could subsequently obtain a judgment and thereby acquire a lien paramount to that of the vendor? Such is not the doctrine in Tennessee.

Kinsey vs. McDearman, 5 Cold., 392.
Green vs. Demoss, 10 Humph., 371.
Brown vs. Vanlier, 7 Humph., 239.
Turner vs. Petigrew, 6 Humph., 438.

GANTT, PATTERSON & LOWE,
Attorneys for Defendants in Error.